United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

363

No. 17,358

403, 404, 405, 406, 407, 408, 409

BERT F. DUESING,

Appellant,

v.

STEWART L. UDALL,
SECRETARY OF THE INTERIOR,

Appellee.

Appeal from a Judgment of the United States District Court
For the District of Columbia Dismissing the Complaint

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QUESTIONS PRESENTED

Pursuant to the Mineral Leasing Act of February 25, 1920, as amended, appellant filed with the Secretary's Bureau of Land Management nine oil and gas lease offers for public domain lands of the United States in the Kenai National Moose Range, Alaska, which were then open to leasing under a regulation of the Department of the Interior issued pursuant to authority conferred on the Secretary by Section 32 of the Act. These lease offers were filed in strict conformity with the statute and regulations and were accompanied by the required filing fees and advance rentals which were accepted by the Bureau of Land Management. Approximately five months after the lease offers were filed and before favorable action could be taken thereon the Secretary, purporting to act under authority conferred by Section 32 of the Mineral Leasing Act, superseded the then existing regulation with a new regulation suspending action on pending lease offers, including appellant's, and instructing representatives of the Bureau of Land Management and the Fish and Wildlife Service to confer for the purpose of entering into an agreement specifying those lands within the moose range that shall not be subject to oil and gas leasing. Almost one year after appellant's lease offers were filed, the Secretary published in the Federal Register a notice of an agreement between the Bureau of Land Management and the Fish and Wildlife Service, which he approved, closing approximately one million acres in the southern half of the moose range to oil and gas leasing, including the land in suit, on the ground that such activities would be incompatible with management thereof for wildlife purposes but at the same time allowing the remaining lands in the northern half of the moose range totaling approximately one million acres to remain open to leasing. Thereafter, appellant's lease offers were rejected. The questions presented follow.

Question 1. Whether the Secretary's action in closing to oil and gas leasing approximately half the Kenai National Moose Range is illegal, unauthorized and in excess of the statutory power conferred upon him by the Mineral Leasing Act of February 25, 1920, as amended, where

(a) Section 1 of the Mineral Leasing Act expressly excludes certain categories of public domain lands from leasing, which does not encompass moose range lands, and affirmatively declares that all other lands of the United States shall be subject to leasing;

(b) Section 32 of the Mineral Leasing Act authorizes the Secretary to prescribe necessary rules and regulations to carry out the purpose of the Act, which is to promote oil and gas development -- not to defeat the purpose of the Act by closing some one million acres of public domain land to oil and gas leasing.

Question 2. Whether the Secretary acted arbitrarily, unreasonably and capriciously in rejecting appellant's offers where

(a) the offers were filed under a lawful regulation which authorized and invited such filing;

(b) the offers were rejected under a subsequently issued regulation which is illegal and unauthorized by statute;

(c) the Secretary admits that the Mineral Leasing Act does not prohibit leasing within the Kenai National Moose Range;

(d) the Secretary admits that he lacks authority under the Mineral Leasing Act to withdraw the moose range lands from leasing.

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Appellee.

Appeal from a Judgment of the United States District Court
For the District of Columbia Dismissing the Complaint

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from an order of the United States District Court for the District of Columbia entered July 23, 1962, granting the defendant's cross-motion for summary judgment and dismissing the complaint. The appeal was filed September 18, 1962 (JA 58). The jurisdiction of the district court is founded on Title 11, Section 306, of

the District of Columbia Code and upon the ground that the matter in controversy arose under the laws of the United States. This Court has jurisdiction under 28 U.S.C. 1291.

OPINION BELOW

The opinion of the district court is not reported. It is set out at pages 55 to 57 of the Joint Appendix.

STATEMENT OF THE CASE

This is an appeal from the judgment of the district court granting the defendant's cross-motion for summary judgment and dismissing the complaint which seeks judicial review of the unlawful and arbitrary actions of the Secretary of the Interior (hereinafter referred to interchangeably as Secretary or appellee) described in the complaint and of the Secretary's action in rejecting appellant's (plaintiff below) nine offers to lease for oil and gas 20,480 acres of public domain lands (hereinafter referred to as the land in suit) in the Kenai National Moose Range, Kenai Peninsula, Alaska.

It is appellant's chief contention that the Secretary arbitrarily and in violation of the statute failed to carry out the plain mandate of Congress in closing to oil and gas leasing approximately one million acres of public lands in the southern half of the moose range and in refusing to issue leases to appellant although appellant was invited and did file applications or offers for leases under a lawful regulation[1] of the Secretary then in force and effect which authorized the issuance of leases and, furthermore, that the Secretary thereafter wrongfully superseded such lawful regulation with a new regulation[2] which is illegal and unauthorized and which conflicts with

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[1] 43 CFR 192.9 approved December 6, 1955, Circular 1945 (JA 11).

[2] 43 CFR 192.9 approved January 8, 1958, Circular 1990 (JA 14).

and is in excess of the statutory power conferred upon the Secretary by the Congress. In issuing such new regulation it is appellant's position that the Secretary improperly usurped the legislative function in an attempt to make law.

The Kenai National Moose Range was established by Executive Order 8979 of December 16, 1941 (6 F.R. 6471). Both prior to the date of the Executive Order and subsequent thereto until publication in the Federal Register on January 10, 1958 (23 F.R. 227), of the controversial regulation Circular 1990 which led to closing of the southern half of the Kenai National Moose Range to oil and gas leasing, the land in suit and other lands in the moose range were open and available for leasing under the provisions of the Mineral Leasing Act of February 25, 1920, as amended (30 U.S.C. 181 et seq.). The issuance of leases in the moose range was made subject to the lessee consenting to certain stipulations of the Fish and Wildlife Service which were designed to provide maximum protection for wildlife. Thus from 1920 to 1958, a period of almost 38 years, the land comprising the Kenai National Moose Range, including the lands in suit, was open and available public domain land subject to oil and gas leasing. Appellant's lease offers were filed in 1957 during the period when the land in suit was open and available for oil and gas leasing as prescribed in the 1955 regulation, Circular 1945.

With this background, we turn to the facts in this case with respect to which there is no dispute. Borrowing from appellant's statement of material facts in the court below (JA 51), which appellee's statement adopted (JA 54), the essential facts are briefly summarized as follows:

1. On August 9, 1957, appellant filed in the Anchorage, Alaska, land office of the Bureau of Land Management nine noncompetitive oil and gas lease offers, identified by serial numbers Anchorage 036561 to 036569, inclusive, covering a total of 20,480 acres of public domain lands [the land in suit] in the Kenai National Moose Range on the Kenai Peninsula, Alaska.

2. The lease offers were submitted in proper form for lands not within a known geological structure of a producing oil or gas field and were accompanied by the proper filing fees and first year rentals, as required by the applicable statute and regulations, which filing fees and rentals were accepted by appellee.

3. When the lease offers were filed on August 9, 1957, the controlling regulation then in force and effect was 43 CFR 192.9 approved December 6, 1955, Circular 1945. This regulation was promulgated by the Secretary pursuant to Section 32 of the Mineral Leasing Act of February 25, 1920, as amended (30 U.S.C. 189), and authorized the issuance of oil and gas leases covering the land in suit.

4. Some five months later on January 8, 1958, the Secretary amended the then existing regulation 43 CFR 192.9 by promulgating a new regulation identified as Circular 1990. This regulation suspended action on all pending offers or applications theretofore filed, including appellant's, for oil and gas leases covering game ranges, coordination lands, and Alaska wildlife areas, and directed representatives of the Bureau of Land Management and the United States Fish and Wildlife Service to confer for the purpose of entering into an agreement specifying those lands which shall not be subject to oil and gas leasing. Such agreement was not to be effective until approved by the Secretary.

5. On July 24, 1958, the Secretary approved an agreement between the Bureau of Land Management and the Fish and Wildlife Service designating an area of about 1,689 square miles in the southern half of the Kenai National Moose Range as closed to oil and gas leasing. The land in suit is part of this area closed to leasing. The northern half of the moose range comprising an area of about 1,525 square miles was declared open to oil and gas leasing. Notice of this agreement was published in the Federal Register of August 2, 1958 (23 F.R. 5883).

6. On the basis of the agreement between the Bureau of Land Management and Fish and Wildlife Service approved by the Secretary on July

24, 1958, closing to oil and gas leasing the southern half of the Kenai National Moose Range, including the land in suit, appellant's lease offers were rejected by two decisions of the Anchorage land office dated August 13, 1958, and August 20, 1958.

It will be noted from the foreging agreed statement of facts that when appellant's lease offers were filed on August 19, 1957, the regulation then in force and effect, Circular 1945, authorized the issuance of leases. In a telegram dated August 21, 1957 (JA 13), to the Anchorage land office of the Bureau of Land Management appellant inquired whether acceptance of the rental and filing fee checks meant that leases would be awarded and, if not, the approximate time when appellant would be advised if he was successful in acquiring the acreage. The land office Manager replied on August 26, 1957 (JA 13) that acceptance of the checks did not necessarily mean that leases would be subsequently issued, that the issuance of leases is governed by Section 17 of the Mineral Leasing Act which requires that leases be issued to the first qualified applicant, that it would be several months before appellant's offers would be reached for adjudication at which time leases would be authorized if it was found "that the applications are valid in all respects, that there are no intervening claims to the land and the above referenced offers are the first qualified applications".

It is undisputed that appellant's lease offers were the first in point of time of filing and were valid in all respects. It was so held in the Opinion of the Court below (JA 55, 56). When appellant's lease offers were reached for adjudication the Manager found that the land in suit was situated within the area of the Kenai National Moose Range which was closed to leasing by the Secretary on July 24, 1958, on the ground that such activities would be incompatible with the management thereof for wildlife purposes (JA 18). He had no alternative, therefore, but to reject the offers which he did in two decisions dated August 13 and August 20, 1958 (JA 20, 21).

On appeal to the Director, Bureau of Land Management, the Manager's decisions were affirmed on March 25, 1959 (JA 22-28). The Acting Director's decision completely ignored the principal issue in the case as to the Secretary's statutory authority to close to oil and gas leasing a large area of public domain land without the sanction of Congress and in the face of Section 1 of the Mineral Leasing Act of February 25, 1920, as amended (30 U.S.C. 181), which spells out the several categories of lands[3] that are expressly excluded from the operation of the Act and which do not encompass the land in suit. Instead, the Acting Director simply held that the determination whether or not to issue a lease lies within the discretion of the Secretary and that if he decides not to lease certain land, offers filed for such land must be rejected.

Appellant then filed an appeal to the Secretary. On October 30, 1961, the Assistant Secretary of the Interior affirmed the Acting Director, Bureau of Land Management, and rendered a decision adverse to appellant (JA 28-50). In this decision the Assistant Secretary held that the agreement of July 24, 1958, closing approximately half the Kenai National Moose Range to oil and gas leasing was not issued pursuant to the Secretary's authority to withdraw public lands but in the exercise of his discretionary authority to issue oil and gas leases. As in the case of the decision of the Acting Director, Bureau of Land Management, the Assistant Secretary also ignored the declared will of Congress expressed in Section 1 of the Mineral Leasing Act that all lands of the United States shall be subject to oil and gas leasing except those categories of lands expressly excluded by the Act itself. Not one word in the Assistant Secretary's decision is addressed to this fundamental issue which appellant stressed in the administrative proceeding.

Appellant, having exhausted the administrative remedy, brought this suit seeking judicial review. The appellee moved to dismiss for failure to state a claim. Appellant then moved for summary judgment and

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[3] These are referred to and discussed in the argument which follows later in this brief.

appellee filed a cross-motion for summary judgment. The appellant's motion was denied, the appellee's cross-motion was granted, and a judgment of dismissal was entered July 23, 1962, as modified July 25, 1962 (JA 58).

STATUTES AND REGULATIONS INVOLVED

Section 1 of the Mineral Leasing Act of February 25, 1920, as amended by the Act of August 8, 1946, c. 916, sec. 1, 60 Stat. 950 (30 U.S.C., 1958 ed. sec. 181), provides, in pertinent part, as follows:

> Deposits of coal, phosphate, sodium, potassium, oil, oil shale, or gas, and lands containing such deposits owned by the United States, including those in national forests, but excluding lands acquired under the Appalachian Forest Act, and those in incorporated cities, towns, and villages and in national parks and monuments, those acquired under other Acts subsequent to February 25, 1920, and lands within the naval petroleum and oil-shale reserves, except as hereinafter provided, shall be subject to disposition in the form and manner provided by this Act to citizens of the United States * * *

Section 17 of the Mineral Leasing Act of February 25, 1920, as amended by the Act of August 8, 1946, c. 916, sec. 3, 60 Stat. 951 (30 U.S.C., 1958 ed. sec. 226), provides, in pertinent part, as follows:

> Sec. 17. All lands subject to disposition under this Act which are known or believed to contain oil or gas deposits may be leased by the Secretary of the Interior. * * * When the lands to be leased are not within any known geological structure of a producing oil or gas field, the person first making application for the lease who is qualified to hold a lease under this Act shall be entitled to a lease of such lands without competitive bidding.

Section 32 of the Mineral Leasing Act of February 25, 1920, c. 85, 41 Stat. 450 (30 U.S.C. 189), provides, in pertinent part, as follows:

> Sec. 32. That the Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations to do any and all things necessary to carry out and accomplish the purposes of this Act * * *

A pertinent excerpt from Department of the Interior regulation 43 CFR 192.9, approved December 6, 1955, 20 F.R. 9009, Circular 1945 (JA 11), reads as follows:[4]

> Sec. 192.9(b)(1). * * * Oil and gas leases may be issued for other lands administered by the Fish and Wildlife for wildlife conservation * * *

Pertinent excerpts from Department of the Interior amended regulation 43 CFR 192.9, approved January 8, 1958, 23 F.R. 227, Circular 1990 (JA 14-17), read as follows:

> Sec. 192.9(a) Definitions. * * *
>
> (4) Alaska Wildlife Areas. Such lands are areas in Alaska created by a withdrawal of public lands for the management of natural wildlife resources and administered by the United States Fish and Wildlife Service.
>
> (b) Leasing policy and procedure. * * *
>
> (3) As to game range lands and Alaska wildlife areas, representatives of the appropriate office of the Bureau of Land Management and the United States Fish and Wildlife Service will confer for the purpose of entering into an agreement specifying those lands which shall not be subject to oil and gas leasing. No such agreement shall become effective, however, until approved by the Secretary of the Interior. * * *
>
> (4) The remaining lands in (a)(2) and (a)(4) not closed to oil and gas leasing will be subject to leasing on the imposition of such stipulations agreed upon by the Fish and Wildlife Service and the Bureau of Land Management. The remaining lands in (a)(3) not closed to oil and gas leasing will be subject to leasing on the imposition of such stipulations agreed upon by the State Game Commission, the United States Fish and Wildlife Service and the Bureau of Land Management.

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[4] In this regulation appellee grouped lands under the jurisdiction of the Fish and Wildlife Service in three categories. The regulation described certain areas as "Appendix A - Fish and Wildlife Service Lands Not Available For Leasing"; other areas as "Appendix B - Fish and Wildlife Service Lands Available For Leasing Under a Satisfactory Development and Operating Plan"; and all other areas available for leasing without qualification. The land in suit falls in this latter category.

STATEMENT OF POINTS

The District Court erred:

1. In holding that "the Secretary of the Interior has discretion to decide whether or not to lease any particular plot of land" notwithstanding

(a) that appellant was invited and did file applications for noncompetitive oil and gas leases for public lands of the United States in the Kenai National Moose Range, Alaska, in strict compliance with the Secretary's regulation in force and effect at that time which was issued pursuant to the rule-making authority vested in the Secretary by the Mineral Leasing Act and which authorized the issuance of leases for such lands; and

(b) that the Secretary unlawfully changed the rules in the middle of the game [after appellant filed his applications but before leases were issued] by promulgating an amendatory regulation which is illegal, unauthorized and in excess of the rule-making power vested in the Secretary by the Mineral Leasing Act and pursuant to which approximately 1,000,000 acres of public lands in the southern half of the Kenai National Moose Range, including the land in suit, were closed to oil and gas leasing.

2. In holding that "The Court is unable to discern anything of an arbitrary or unreasonable character in the action of the Secretary" in withholding the land in suit from leasing and in rejecting appellant's applications, notwithstanding

(a) that the Secretary drew an arbitrary line through the Kenai National Moose Range closing the southern half to oil and gas leasing in plain violation of the express provisions of the Mineral Leasing Act while permitting the northern half to remain open to leasing;

(b) that the Secretary admitted "To my knowledge he [the Secretary] has never asserted that he had authority under the Mineral Leasing Act to withdraw land from leasing."; and

(c) that the Secretary admitted "The facts are undisputed. The Mineral Leasing Act does not prohibit leasing within a moose range. The pertinent regulation, until its amendment in January 1958, permitted oil and gas leasing of lands in wildlife refuges under certain conditions (43 CFR, 1954 ed., sec. 192.9) and would not necessarily have prevented the issuance of leases to appellants."

3. In holding that "The Court perceives no illegality in the action of the Secretary and is of the opinion that, as a matter of law, the plaintiff is not entitled to relief" notwithstanding

(a) that the amendatory regulation which allegedly stems from the rule-making power vested in the Secretary by the Mineral Leasing Act and which closed the southern half of the Kenai National Moose Range to oil and gas leasing, is illegal, unauthorized and in direct conflict with the provisions of the Mineral Leasing Act, and

(b) that the Chairman, Subcommittee on Public Lands, Committee on Interior and Insular Affairs of the United States Senate, denounced the Secretary's amendatory regulation as constituting a repeal of the Oil and Gas Leasing Act so far as wildlife areas are concerned.

4. In holding that "The Secretary of the Interior, of course, as any other government official, had a right to change his mind [about leasing the land in suit] unless, indeed, any vested rights had intervened. The fact is that no vested rights intervened here." This ignores the fact that when appellant filed his applications he paid rentals totaling $5,120 and filing fees totaling $90, which the Secretary accepted, and also incurred additional expenditures in geological investigation of the lands sought for lease. Appellant thus earned rights which may not be tossed aside particularly where the Secretary's legal authority to do so finds no support in and is actually contrary to the terms of the statute.

5. In granting the Secretary's motion for summary judgment, in denying the plaintiff's motion for summary judgment, and in dismissing the complaint.

SUMMARY OF ARGUMENT

I

Where the Secretary admits that he lacks authority to withdraw lands in the Kenai National Moose Range from oil and gas leasing and then asserts the right to accomplish the same objective by exercising his discretionary power to issue or not issue leases under an illegal and unauthorized regulation, it constitutes a clear circumvention of the letter, spirit and purpose of the Mineral Leasing Act. The Secretary may not substitute his judgment for the judgment of Congress in determining whether wildlife areas on the public domain shall be subject to leasing. Congress has spelled out with exactness in Section 1 of the Act the categories of land which are excluded from its operation. Wildlife areas are not excluded. The rule making power of the Secretary to prescribe regulations does not carry with it the power to make law but merely to carry into effect the will of Congress as expressed in the statute. A regulation which is inconsistent, out of harmony, and in conflict with the statute is illegal and a nullity.

II

Section 17 of the Mineral Leasing Act does not confer on the Secretary blanket power, absolute and unlimited, to grant or deny a lease depending upon his whim or caprice. The Secretary's contention of absolute discretion, if sustained, would make his decisions immune from judicial review. Suspension by the Secretary of the processing of lease offers in the Kenai National Moose Range over a long period of time without notice, actual or constructive, to applicants for leases is an abuse of executive power. The fact that leases were issued in the moose range for only two months over a five year period establishes in itself the arbitrary action of the Secretary. Where the appellant filed lease offers under a valid regulation which invited the filing of applications the Secretary may not change his mind and withhold the land from leasing by issuing a new regulation which is illegal and improper and in excess of the Secretary's power.

III

Closing to oil and gas leasing the southern half of the Kenai National Moose Range on the ground that such activity would be incompatible with management thereof for wildlife purposes does not constitute a statement of the factual and legal basis therefor as required by Section 4(b) of the Administrative Procedure Act. The agreement of July 24, 1958, closing the southern half of the moose range to leasing is therefore procedurally invalid and without legal effect.

ARGUMENT

I

The Secretary's Regulation 43 CFR 192.9, Approved January 8, 1958, Circular 1990, Pursuant to Which Approximately Half of the Kenai National Moose Range Is Closed to Oil and Gas Leasing Is Illegal, Unauthorized And in Excess of His Statutory Power and Constitutes an Invalid and Improper Exercise of His Discretionary Authority over the Issuance of Noncompetitive Leases.

In his decision of October 30, 1961, the Secretary concedes that neither the regulation approved January 8, 1958, Circular 1990, nor the agreement of July 24, 1958, closing part of the Kenai National Moose Range to oil and gas leasing purports to be a withdrawal of land (JA 36). Referring to the source of the Secretary's authority to withdraw public lands the Secretary stated (JA 37):

> "* * * To my knowledge he has never asserted that he had authority under the Mineral Leasing Act to withdraw land from leasing."

Explaining the basis for the agreement of July 24, 1958, the Secretary said (JA 37):

> "In adopting the agreement of July 24, 1958, the Secretary was simply exercising in a formal manner his discretionary authority over issuing noncompetitive leases under section 17 of the Mineral Leasing Act. Because the effect upon oil and gas applicants of the exercise of this authority

> is the same as a withdrawal of land, the appellants have confused the two authorities together. But the source of authority does not change because of its effect. Stripped of all authority to withdraw lands, the Secretary would still have his discretionary authority to refuse to issue leases where he thinks issuance would not be in the public interest."

In the excerpts from the Secretary's decision quoted above, he frankly admits that closing the southern half of the moose range to leasing does not constitute a withdrawal of land since he has no authority under the Mineral Leasing Act to withdraw land from leasing. But he is equally frank in boldly declaring his right to achieve the same result by exercising blanket power to refuse to issue leases covering large areas of the public domain. This is a clear circumvention of the letter, spirit and purpose of the Mineral Leasing Act. In this posture, we turn then to the pertinent provisions of the Mineral Leasing Act to determine whether the Secretary's 1958 regulation, Circular 1990, pursuant to which the agreement closing part of the moose range to leasing was adopted, is valid or invalid. In the Secretary's decision of October 30, 1961, he states that "The Manager and Acting Director [Bureau of Land Management] based their decisions upon this directive and indeed, if it is valid, the offers must be rejected (JA 32)". On the other side of the coin, if the regulation is invalid and unauthorized by the Mineral Leasing Act it is a nullity and does not operate to defeat appellant's right to be awarded leases for the land in suit.

The single purpose of the Mineral Leasing Act is aptly expressed in the title of the Act of February 25, 1920, as amended by the Act of August 8, 1946 (60 Stat. 950), which reads "To amend the Mineral Leasing Act of February 25, 1920, as amended, in order to promote the development of oil and gas on the public domain, and for other purposes." (Emphasis added.) Section 1 of the Mineral Leasing Act, as amended by the Act of August 8, 1946 (30 U.S.C., 1958 ed. sec. 181), provides in pertinent part, as follows:

> "Deposits of coal, phosphate, sodium, potassium, oil, oil shale, or gas, and lands containing such deposits owned by the United States, including those in national forests, but excluding lands acquired under the Appalachian Forest Act, and those in incorporated cities, towns, and villages and those in national parks and monuments, those acquired under other Acts subsequent to February 25, 1920, and those lands within the naval petroleum and oil-shale reserves, except as hereinafter provided, shall be subject to disposition in the form and manner provided by this act to citizens of the United States, * * *" (Emphasis added.)

It is important to note that neither wildlife lands in general nor the Kenai National Moose Range in particular are among the categories of land expressly excluded from the operation of the Mineral Leasing Act. Equally important to note is the fact that except for the excluded lands Congress has directed in mandatory terms that all other lands owned by the United States "shall be subject to disposition" in the form and manner provided by the Act. Bearing in mind that Section 1 spells out with exactness the categories of land excluded from the operation of the Act there can be no doubt that had Congress intended to exclude wildlife lands from oil and gas leasing it would have done so expressly in the same section of the Act. The Secretary does not disagree with this view because he states in his decision of October 30, 1961 (JA 38):

> "* * * The facts are undisputed. The Mineral Leasing Act does not prohibit leasing within a moose range. The pertinent regulation, until its amendment in January 1958, permitted oil and gas leasing of lands in wildlife refuges under certain conditions (43 CFR, 1954 ed., sec. 192.9) and would not necessarily have prevented the issuance of leases to appellants." (Emphasis added.)

Yet, despite the foregoing, the Secretary boldly proclaims the right to exercise blanket power in closing to oil and gas leasing approximately one million acres in the Kenai National Moose Range and in refusing to issue leases where he "thinks" issuance would not be in the public interest. What the Secretary appears to have overlooked, however, is that in refusing to issue such leases to appellant for the land in suit he has erroneously substituted his concept of what may be in the public interest for the

judgment of Congress as expressed in the Mineral Leasing Act. In his decision the Secretary stated the reason for closing the southern half of the moose range to oil and gas leasing to be "because such activities would be incompatible with management thereof for wildlife purposes (JA 31)". But in enacting the basic Mineral Leasing Act of February 25, 1920, and the various major amendatory acts in the years that followed, Congress has never deemed oil and gas leasing activities on the public domain incompatible with management of wildlife areas. Where circumstances warranted, however, Congress has on many occasions enacted special legislation setting aside wildlife areas in which no leasing activity of any kind is permitted.

We turn now to the rule making power of the Secretary. The controversial 1958 regulation, Circular 1990, purports to stem from the authority conferred on the Secretary by Section 32 of the Mineral Leasing Act (30 U.S.C. 189).[5] That section reads, in pertinent part, as follows:

> "That the Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this Act, * * *" (Emphasis added.)

When appellant filed his lease offers on August 9, 1957, the controlling regulation then in force and effect was Circular 1945 approved December 6, 1955. This regulation was issued pursuant to Section 32 of the Act and it is conceded by the Secretary that it authorized the issuance of leases for the land in suit. Manifestly, this regulation when issued was necessary and proper and in conformity with the authority granted to the Secretary by Section 32 of the Mineral Leasing Act "to do any and all things necessary to carry out and accomplish the purposes of this Act." It is, of course, now well settled that a valid regulation of the Interior Department has the force and effect of law and is binding on the Secretary while it is in effect.[6]

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5 See 22 F.R. 8088, notice of proposed rule making, which subsequently was adopted as Circular 1990.

6 Chapman v. Sheridan-Wyoming Coal Co., 338 U.S. 621, 629 (1950); United States ex rel Accardi v. Shaughnessy, 347 U.S. 260, 265 (1954); McKay v. Wahlenmaier, 96 App. D.C. 313, 321, 226 F.2d 35, 43 (1955).

When the Secretary decided to close the southern half of the Kenai National Moose Range to leasing he was cognizant of his lack of power under the Mineral Leasing Act to withdraw the lands. Accordingly, he issued an amendatory regulation, Circular 1990 approved January 8, 1958, which superseded the earlier 1955 regulation Circular 1945. This is an amazing regulation. First, it gave as the source of its authority Section 32 of the Mineral Leasing Act, and second, it instructed representatives of the Bureau of Land Management and the Fish and Wildlife Service to get together and enter into an agreement specifying which areas were to be closed to leasing. A notice closing half the moose range to leasing followed on July 24, 1958 (JA 18). Here we find a curious twist. Whereas Section 32 of the Mineral Leasing Act authorizes the Secretary to prescribe necessary rules and regulations to carry out the purpose of the Act, which is to promote oil and gas development, the Secretary used this same statutory authority to defeat the purpose of the Act by closing one million acres of public lands to oil and gas leasing. A more obvious example of an executive officer of Government attempting to usurp the legislative function of making law is difficult to perceive. This regulation flies directly in the face of and is diametrically contrary to the declared purpose of Section 32 of the Act which is to promote oil and gas development. It is clear to us that the 1958 regulation, Circular 1990, is inconsistent and in conflict with the statute and goes far beyond the proper exercise of the power of the Secretary to promulgate regulations which bear a reasonable relation to the purposes sought to be achieved by the Congress.[7] Moreover, it is submitted that the power of an administrative officer to prescribe regulations does not carry with it the power to make law.[8] For

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[7] Maryland Casualty Co. v. United States, 251 U.S. 342, 349; United States v. Smull, 236 U.S. 405, 409, 411; Thompson v. Consolidated Gas Utilities Corp., 300 U.S. 55, 69, 70; International Ry. Co. v. Davidson, 257 U.S. 506, 514.

[8] Manhattan General Equipment Co. v. Commissioner of Internal Revenue, 297 U.S. 129, 134, 135; Miller v. United States, 294 U.S. 435, 439, 440; United States v. George, 228 U.S. 14, 21; United States v. Grimaud, 220 U.S. 506, 517; United States v. United Verde Copper Co., 196 U.S. 207, 215.

a regulation to be proper, the United States Supreme Court in Maryland Casualty Co. v. United States, supra, has pronounced the rule to be as follows (at p. 349);

> "* * * It is settled by many recent decisions of this court that a regulation by a department of government, addressed to and reasonably adapted to the enforcement of an act of Congress, the administration of which is confided to such department, has the force and effect of law if it be not in conflict with express statutory provision. United States v. Grimaud, 220 U.S. 506; United States v. Birdsall, 233 U.S. 223, 231; United States v. Smull, 236 U.S. 405, 409, 411; United States v. Morehead, 243 U.S. 607. * * * "

The United States Supreme Court has also indicated with clarity the kind of regulation which is improper and invalid. In Manhattan General Equipment Co. v. Commissioner of Internal Revenue, supra, the Supreme Court said (at pp. 134-135):

> "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law--for no such power can be delegated by Congress--but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity. Lynch v. Tilden Produce Co., 256 U.S. 315, 320-322; Miller v. United States, 294 U.S. 435, 439-440, and cases cited. And not only must a regulation, in order to be valid, be consistent with the statute, but it must be reasonable. International Ry. Co. v. Davidson, 257 U.S. 506, 514. The original regulation as applied to a situation like that under review is both inconsistent with the statute and unreasonable." (Emphasis added.)

In Miller v. United States, supra, the Supreme Court said (at pp. 439-440):

> "It [the administrative regulation] is invalid because not within the authority conferred by the statute upon the Director (or his successor, the Administrator) to make regulations to carry out the purpose of the Act. It is not, in the sense of the statute, a regulation at all, but legislation. * * * This is beyond administrative power. The only authority conferred, or which could be conferred, by

> the statute is to make regulations to carry out the purposes of the act--not to amend it. United States v. 200 Barrels of Whiskey, 95 U.S. 571, 576; Morrell v. Jones, 106 U.S. 466, 467; United States v. Grimaud, 220 U.S. 506, 517; Campbell v. Galeno Chemical Co., 281 U.S. 599, 610." (Emphasis added.)

The principles thus enunciated by the United States Supreme Court may be summarized in a few brief sentences. One is that the power of an administrative officer to prescribe regulations does not carry with it the power to make law. The second principle is that the only purpose of a regulation is to carry into effect the will of Congress as expressed in the statute. The third principle is that a regulation to be valid must be reasonable, must be consistent with the law, and must bear a reasonable relation to the purpose sought to be achieved by the law. In the light of these principles, it is submitted that the 1958 regulation, Circular 1990, is inconsistent and in conflict with the Mineral Leasing Act, and is therefore invalid and a nullity. In Procter & Gamble Co. v. Coe, 68 App. D.C. 246, 96 F.2d 518 (1938), the Court of Appeals for the District of Columbia, after citing many cases, stated as follows (pp. 249-250):[9]

> "The following tests have been used to uphold the exercise of judicial restraint upon executive action under valid laws: (1) Where an officer, insisting that he has the warrant of the statute, is transcending its bounds, and thus unlawfully assuming to exercise the power of government * * * (2) where an officer attempts to enlarge his power, or to usurp power * * * (3) where his act is based upon a clear mistake of law * * * (4) where the action of the officer or administrative body is clearly beyond its power and in violation of the statute * * * (5) where an officer has acted, or threatens to act, in a capricious and arbitrary manner * * * (6) where the act of the officer, 'under any view that could be taken of the facts that were laid before him, was ultra vires, and beyond the scope of his authority * * *' "

In the case at bar, the administrative action of the Secretary in closing approximately one million acres in the southern half of the moose

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[9] Cited with approval in Seaton v. Texas Company, 103 U.S. App. D.C. 163, 168 (1958) a case in which the then Secretary of the Interior was a party.

range to oil and gas leasing is unlawful, unauthorized and in excess of the statutory power conferred upon him by the Congress. This view is fortified by the vigorous position taken by former Senator Joseph C. O'Mahoney, then Chairman, Subcommittee on Public Lands, Committee on Interior and Insular Affairs of the United States Senate, immediately following the issuance by the Secretary of his amendatory regulation 43 CFR 192.9, approved January 8, 1958, Circular 1990.[10] This Committee Print, which discusses in great detail the very regulation and action of the Secretary involved in this suit, is a most interesting and illuminating document and we respectfully urge this Court to give it the consideration it deserves. In a letter dated January 24, 1958, to the Chairman of the full Committee on Interior and Insular Affairs, which was written about two weeks after the Secretary issued the regulation here in question, Senator O'Mahoney said, in pertinent part, as follows:[11]

> "At the initial meeting of the Committee on Interior and Insular Affairs this year, I called the attention of the committee to the action of the Secretary of the Interior in promulgating on January 8 amended regulations purporting to govern mineral leasing on large areas of the public lands which the Secretary had designated as Federal Wildlife lands. The purpose of this letter is to advise you and the members of the committee why I intend, as chairman of the Public Lands Subcommittee, to hold hearings on the meaning and effect of the regulations as well as their desirability from the point of view of maximum use of our public lands and resources.
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> * * * * *
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> "The Mineral Leasing Act, Public Law 146, 66th Congress, approved February 25, 1920, originated in the Senate as S. 2775. The then Public Lands Committee of this body and the Public Lands Committee of the House held hearings and conducted all of the other legislative proceedings leading to the favorable reports of both the House and Senate

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[10] See Committee Print, 85th Congress, 2nd Session, entitled "Executive Modification of the Mineral Leasing Act on Federal Wildlife Lands" which is annexed as Exhibit 1 to the Memorandum of Points and Authorities in support of Plaintiff's motion for summary judgment in the Court below.

[11] Committee Print, pp. 1-2.

committees on the measure. The act, as its title shows, was designed 'to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain.' Section 1 of the act makes it clear that its provisions apply to all deposits of such minerals and 'lands containing such deposits owned by the United States, including those in national forests * * *'. The only lands owned by the Federal Government which are excluded by the terms of the statute are those under the Appalachian Forest Act, those in national parks, and those reserved for military or naval purposes.

"Section 32 of the Mineral Leasing Act gives the Secretary of the Interior the authority 'to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this act.' I find no provisions authorizing the Secretary to issue any regulations out of harmony with the expressed purpose of the act, namely, to promote the development of oil and gas and other minerals on the public domain.

"An examination of the Federal statutes shows that wildlife reservations from the public lands of the character with which we are here concerned are created by acts of Congress and by formal executive withdrawal. The law pertaining to wildlife refuges fails to reveal authority for the Secretary to prescribe regulations which repeal, in effect, the Oil and Gas Leasing Act so far as wildlife areas are concerned -- areas which are not excluded from the operation of the Mineral Leasing Act under the terms of that statute itself. Nor is there any authority of law vesting in the Secretary the power to amend the Mineral Leasing Act in any particular. * * *" (Emphasis added.)

A year later on January 26, 1959, Senator O'Mahoney again expressed his great concern over this matter from the standpoint of the responsibility of the Congress under the Constitution in a letter to the members of the Committee on Interior and Insular Affairs. He said in pertinent part, as follows:[12]

> "As the members of the committee undoubtedly are aware, I have been increasingly troubled by the growing tendency on the part of the executive branch to suspend or modify acts of Congress by administrative action without

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[12] Committee Print, Foreward, p. III.

statutory or constitutional authority. Such encroachment on legislative responsibilities has been especially flagrant with respect to the public lands.

"Clause 2, section 3, article IV of the Constitution provides:

> "The Congress shall have power to dispose of and make all needed rules and regulations respecting the territory or other property of the United States.'

"In fulfillment of this responsibility, the Congress has enacted a long series of laws providing for disposition or use of the lands and resources belonging to the United States. Included in these Congressional enactments are statutes setting aside specific areas for fish and wildlife purposes, and, in 1920, a general leasing statute for oil and gas and certain other minerals (act of February 25, 1920). Nowhere in this act is there authority for the Secretary of the Interior to modify or suspend it, at will, with respect to any of the lands to which it applies. Nowhere in this or any other act is authority given to the Secretary to withdraw or set aside any areas he may see fit to designate Federal Wildlife lands.

"Yet many millions of acres of the public lands of the United States have been so set aside by the Secretary, and the Mineral Leasing Act, in fact, suspended or amended with respect to them as the result of regulations which the Secretary purported to issue on January 8, 1958 (43 CFR 192.9). These regulations cite as their authority section 32 of the act itself. But Congress in the act gave the Secretary power to issue regulations only for the purpose of carrying it into effect, not authority to amend it. This is the clear meaning of the language of Congress in section 32 of the Mineral Leasing Act.

"I believe the members of the committee will agree that an inquiry into the question of the best use of our remaining public lands, and the full development of all of their resources in accordance with the principle of multiple use, should be undertaken. I propose that such an inquiry be made by the Public Lands Subcommittee, with all other members of the committee, or any other Senators, urged to participate fully and freely."[13]

We adopt in its entirety the forthright and penetrating analysis made by the then Chairman of the Senate Interior and Insular Affairs

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[13] No inquiry or hearing was ever conducted because Senator O'Mahoney suffered a stroke and at the end of his term retired from public life.

Subcommittee on Public Lands on the history and purpose of the Mineral Leasing Act in relation to the unauthorized regulation of defendant which the Chairman pointed out served, in effect, to repeal or amend the Oil and Gas Leasing Act. Senator O'Mahoney served on the Committee for a great many years and authored a number of major amendments to the basic leasing act of February 25, 1920. His views are therefore persuasive as to the intent of Congress in applying the provisions of the Mineral Leasing Act to public domain wildlife areas such as the Kenai National Moose Range. We submit that the facts clearly establish that the Secretary's regulation 43 CFR 192.9, approved January 8, 1958, Circular 1990, does not carry into effect the will of Congress as expressed by the Mineral Leasing Act of February 25, 1920, as amended, that it is inconsistent and in conflict with Section 1 of the Mineral Leasing Act, that it is out of harmony with the purpose of the statute and therefore not authorized by section 32 of the Act, and finally that the regulation is in excess of the Secretary's statutory power and is a nullity.

II

The Secretary's Rejection of Appellant's Lease Offers Covering Land in the Part of the Kenai National Moose Range Improperly Closed to Oil and Gas Leasing is Arbitrary, Unreasonable and Discriminatory, and is Contrary to Law.

In his decision of October 30, 1961 (JA 37) the Secretary attempts to justify the rejection of appellant's lease offers on the ground that he has complete discretionary authority to decide whether or not to issue leases under Section 17 of the Mineral Leasing Act of February 25, 1920, as amended by the Act of August 8, 1946 (30 U.S.C., 1958 ed. sec. 226). In effect, this contention if sustained would confer on the Secretary blanket power, absolute and unlimited, to grant or deny a lease depending upon his whim or caprice. This is a novel and dangerous concept unprecedented since the era of former Secretary of the Interior Albert B. Fall. Upholding the Secretary's contention of absolute discretion would make

his decisions immune from judicial review. It would not even serve any purpose for this Court to review the Secretary's regulation here under scrutiny to determine its validity or invalidity for if the Secretary has absolute discretion to grant or deny leases at will the validity or invalidity of the regulation would be immaterial. This is bureaucracy at its worst. And yet this appears to be the sum and substance of the Secretary's position. The Secretary's own decision of October 30, 1961 illustrates the danger of abuse of executive power which can easily result from failure to adhere to regulations which carry out the will of Congress or from failure to publish in the Federal Register notice of substantive and procedural matters which affect the rights of appellant and others in a similar status. Thus, he states (JA 41):

> "In summary, the only period from August 31, 1953, to January 8, 1958, when the processing of oil and gas lease offers for lands in the Kenai moose range was not suspended was from December 6, 1955, to February 6, 1956, a period of two months. None of the offers on appeal was filed in that period. In other words, the appellants filed their offers at times4/ when it was well known that the Department was deeply involved in attempts to work out a solution to the problem of the conflicting demands for the utilization of the moose range and when it was perfectly apparent that one course of action the Department might adopt would be to close all or part of the moose range to leasing. In the circumstances, the appellants cannot properly allege that the fact that they filed offers raises any equitable considerations in their behalf. At best, they gambled that the lands they applied for would be opened to leasing. Having lost, they have little ground for complaint."
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> 4/ The offers were filed at various times from May 21, 1954, to January 8, 1958.

Answering directly the Secretary's statement of leasing activity in the Kenai National Moose Range over the period from August 31, 1953, to January 8, 1958, appellant categorically denies any knowledge, actual or constructive, of any suspension in the processing of lease offers in the moose range until publication in the Federal Register of January 10, 1958 (JA 14) of the new regulation, Circular 1990, which closed the southern

half of the moose range to oil and gas leasing. If, as the Secretary states in his decision (JA 39, 40), instructions were issued to field officers on at least two occasions to suspend action on all offers for oil and gas leases in fish and wildlife areas why then were not these instructions published in the Federal Register so as to constitute constructive notice to appellant and others? The plain fact is that the intentions of the Secretary and his subordinates were known to them alone because no notice, constructive or otherwise, was given appellant or others. Confirming our position in this respect is the fact shown by the record (JA 13) that when appellant made inquiry of the Anchorage land office of the Bureau of Land Management by telegram of August 21, 1957, as to whether the acreage applied for would be awarded to him, the Manager's response of August 26, 1957 (JA 13), made no reference at all to any suspension in the processing of lease offers. On the contrary, the Manager stated that when appellant's lease offers were reached for adjudication several months hence leases would be issued if appellant was the first qualified applicant and there were no intervening claims. Obviously the Manager was unaware on August 26, 1957, of any suspension in the processing of lease offers. It follows that the Secretary is clearly wrong in stating in his decision that appellant should have been aware of the possibility that all or part of the moose range might be closed to leasing.

We submit that it is perfectly obvious that the then Secretary's actions over the period from 1953 to 1958, so far as the Kenai National Moose Range is concerned, was not communicated to appellant or to others who expressed interest in acquiring leases in the moose range. Moreover, if it is a fact that the then Secretary permitted the processing of lease offers and the issuance of leases for just a two month period, namely, from December 6, 1955, to February 6, 1956 (JA 41), he placed himself in a vulnerable position where he might have been accused of favoring some applicants for leases as against others. This is a dangerous course for any public official to follow and one that can only lead to abuse of the administrative process. Equally wrong and subject to criticism was the

Secretary's approval of the agreement of July 24, 1958, closing the southern half of the moose range to leasing while permitting the northern half to remain open to leasing. Nothing was ever published to explain the reasons for splitting the moose range in half for leasing purposes other than the statement that leasing in the southern half would be incompatible with management thereof for wildlife purposes. What circumstances then make the issuance of leases in the northern half of the moose range compatible with management thereof for wildlife purposes? One has merely to read the statement of January 29, 1958, of the then Secretary of the Interior (JA 19) to reach the conclusion that closing approximately one million acres of public lands in the Kenai National Moose Range to oil and gas leasing was arbitrary, unreasonable and discriminatory. The same stipulations which the then Secretary stated provide maximum protection for fish and wildlife in the northern half of the moose range are also available to provide maximum protection for fish and wildlife in the southern half.

In the circumstances of this case the position of the Secretary that he has absolute and unlimited discretionary authority to issue or not issue leases in the Kenai National Moose Range is untenable. In fact, this Court has on several occasions rejected contentions of the Secretary of the Interior that his decisions involving the exercise of discretion in awarding noncompetitive oil and gas leases were unreviewable.[14] No one seriously disputes the right of the Secretary under Section 17 of the Mineral Leasing Act, as amended by the Act of August 8, 1946 (30 U.S.C., 1958 ed., sec. 226), to reject an oil and gas lease offer where proper circumstances warranting such action exist. But this discretionary authority is not absolute and unlimited, as the Secretary contends, and does not permit the rejection of lease offers where his action is arbitrary, unreasonable or capricious and violates the plain provisions of the statute itself, as in the case at bar. Section 17, in pertinent part, provides as follows:

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[14] McKay v. Wahlenmaier, 96 U.S. App. D.C. 313, 324-325, 222 F.2d 35 (1955); Seaton v. Texas Company, 103 U.S. App. D.C. 163, 167, 256 F.2d 718 (1958); McKenna v. Seaton, 104 U.S. App. D.C. 50, 54, 259 F.2d 780 (1958).

> "Sec. 17. All lands subject to disposition under this Act which are known or believed to contain oil and gas deposits may be leased by the Secretary of the Interior. * * * When the lands to be leased are not within any known geological structure of a producing oil or gas field, the person first making application for the lease who is qualified to hold a lease under this Act shall be entitled to a lease of such lands without competitive bidding."

While the language "may be leased" in the first sentence of Section 17 is permissive, the language "shall be entitled to a lease" in the last sentence mandatorily requires the issuance of a lease to the first qualified person where the Secretary has by regulation exercised his discretion and declared the lands open and available to leasing. When appellant's lease offers were filed on August 9, 1957, the regulation in force and effect at that time, Circular 1945 approved December 6, 1955, authorized the issuance of noncompetitive leases covering the land in suit. This regulation constituted an invitation by the Secretary for appellant to file lease offers for the land in suit in the Kenai National Moose Range. Having done so, the Secretary is mandatorily required by Section 17 to issue leases to appellant as the first qualified applicant. It was so held by this Court in McKay v. Wahlenmaier, supra, in which the Court said (at pp. 324-325):

> "There can be no doubt as to the District Court's power, not only to direct the Secretary to cancel a lease issued to an unqualified applicant, but also to order him to issue one to the person first making application therefor who is qualified to hold a lease. Whether to offer land for lease is a discretionary matter with the Secretary. But, having invited applications for a noncompetitive lease, he has no discretion as to selecting the lessee; the statute awards the lease to the first qualified applicant. That is to say, it is then the plain legal duty of the Secretary to perform the merely ministerial act of issuing a lease to such applicant. When, as in this case, the Secretary refuses to perform that act, under a familiar and well established principle the courts may mandatorily order him to do that which the statute requires him to do and about which he has no discretion."

In the court below Judge Holtzoff held that the Secretary had a right to change his mind and to withhold the land in suit from leasing (JA 57). We disagree because the right of the Secretary to change his mind and withhold land from leasing may not be accomplished by means of an illegal and improper regulation, Circular 1990 approved January 8, 1958, which is unauthorized by the Mineral Leasing Act and in excess of the Secretary's power. If Circular 1990 is invalid and a nullity, as we contend, it cannot operate to supersede Circular 1945, which is a valid and proper regulation and, consequently, it does not alter the Secretary's statutory obligation to issue leases to appellant as the first qualified applicant for the land in suit. We do not, of course, question the Secretary's right in principle to change his mind and withhold land from leasing but it must be done in a manner authorized by law.

In the administrative proceedings before the Department of the Interior and in District Court the Secretary relied completely on Haley v. Seaton, 108 U.S. App. D.C. 257, 281 F.2d 620 (1960), as authority for the proposition that he has absolute and complete discretion to issue or not issue at will noncompetitive oil and gas leases. In District Court, Judge Holtzoff agreed with the Secretary that Haley v. Seaton, supra, supported his position of absolute discretion. Referring to the Secretary changing his mind and announcing that he would not lease the land in suit, Judge Holtzoff added that "His purpose in so doing is immaterial, * * * (JA 56)". We disagree with Judge Holtzoff that the ruling of the Court of Appeals in the Haley case is so broad as to confer on the Secretary unlimited power to reject lease offers no matter what the purpose or reasons may be or how improper or illegal his action is. In the case at bar we contend that the Secretary's 1958 regulation, Circular 1990, is illegal and may not be used as a basis for rejecting appellant's offers.

Because Haley v. Seaton, supra, has been cited by the Secretary and by the Court below to support the Secretary's claim of absolute discretion to grant or deny leases at will, we shall establish in the discussion that follows that the Haley case is completely irrelevant and without

applicability to the case at bar. First and foremost, neither the Haley case nor the line of prior decisions of the Court of Appeals for the District of Columbia followed by Haley and cited therein, involved public domain lands subject to noncompetitive oil and gas leasing.[15] The Haley case involved a noncompetitive oil and gas lease for Indian lands which are not subject to leasing under the terms of the Mineral Leasing Act. In the case at bar, however, it is conceded that the land in suit is public domain land subject to leasing pursuant to the Mineral Leasing Act. In Haley the Court made it clear that Indian lands are not subject to noncompetitive leasing under the terms of the Mineral Leasing Act in the following language (at p. 260):

> "Indian lands are not leasable under the Mineral Leasing Act. 34 Op. Atty. Gen. 171 (1924). They may be leased under special acts providing for the leasing of Indian lands."

Again the Court stated (at pp. 262-263):

> "The Secretary had not determined that the lands covered by Haley's application are 'to be leased' under the Mineral Leasing Act. He has only determined that the lands are Indian lands and that they should be leased under the statutes providing for the leasing of Indian lands."

In Haley and in the cases therein cited and followed (fn 15) the Secretary lacked statutory power to issue noncompetitive oil and gas leases under the Mineral Leasing Act even if he wished to do so. The discretionary authority of the Secretary, which this Court referred to in those cases, was pure dictum and unnecessary for a decision on the merits because in fact in all of these cases the Secretary lacked statutory authority to do anything else but reject the noncompetitive oil and gas lease offers. The Jordan case, supra, involved submerged lands of the United States

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[15] In this category are United States ex rel Jordan v. Ickes, 79 App. D.C. 114, 143 F.2d 152 (1944), certiorari denied 320 U.S. 801; Dunn v. Ickes, 72 App. D.C. 325, 115 F.2d 36 (1940), certiorari denied 311 U.S. 698; United States ex rel Roughton v. Ickes, 69 App. D.C. 324, 101 F.2d 248 (1938); Wann v. Ickes, 67 App. D.C. 291, 92 F.2d 215 (1937).

off the coast of California. The Dunn case, supra, involved land which it appeared had been patented as a confirmed private land claim. The Roughton case, supra, involved land which formerly comprised the abandoned Fort Hayes Military Reservation in the State of Kansas and which was later granted by Act of Congress to the State for certain specified purposes with a reservation clause to the United States in the event the land ceased to be used for the purposes specified. In none of the latter cases was the land applied for public domain land subject to noncompetitive oil and gas leasing under the terms of the Mineral Leasing Act. The Wann case, supra, involved public domain land within a know geological structure of an oil and gas field. Rejection of a noncompetitive lease offer was therefore proper since the Mineral Leasing Act made it mandatory for the Secretary to lease land within a known geological structure only by competitive bidding.

The case of United States ex rel. McLennan v. Wilbur, 283 U.S. 414 (1931), also cited in Haley v. Seaton, supra, on the question of the Secretary's discretionary authority is similarly inapposite and not relevant to the issues in the case at bar. There, Section 13 of the basic Mineral Leasing Act of February 25, 1920, authorized the Secretary of the Interior to grant to any applicant qualified under the Act a prospecting permit[16] for a period not exceeding two years to prospect for oil and gas. Upon making a discovery the permittee was entitled to receive a lease for one-fourth of the land embraced in the permit. Because of great overproduction of crude oil in this country and to effectuate the conservation policy of the President the Secretary issued an order on March 16, 1929, pursuant to which the Commissioner of the General Land Office[17] was instructed not to receive further applications for prospecting permits covering all public domain lands and to reject all such applications then pending. Upholding the right of the Secretary to do so in this emergency

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[16] The issuance of prospecting permits was abolished by the amendatory Act of August 21, 1935 (49 Stat. 674).

[17] Now known as the Bureau of Land Management.

situation the Supreme Court said (at p. 419):[18]

> "It is unnecessary now to declare the precise meaning of the relevant provisions of the Act. It was passed when according to a widely accepted view decline of petroleum production in the United States was imminent. In fact, there has been an enormous increase and a consequent troublesome surplus. Looking only at its words one may interpret Section 13 as the Secretary says he did. And this conclusion is aided by consideration of his general powers over the public lands as guardian of the people. Sec. 441, R.S.; United States v. Grimaud, 220 U.S. 506; Williams v. United States, 138 U.S. 514; Knight v. United States Land Assoc., 142 U.S. 161; also the right of the President to withdraw public lands from private appropriation. United States v. Midwest Oil Co., 236 U.S. 459; Withdrawal Act, 1910, 36 Stat. 847." (Emphasis added.)

There is a vast distinction between the McLennan case and the case at bar. The McLennan case involved a national emergency situation in which the Secretary acted in behalf of the President, the Secretary's Order was a withdrawal of public lands, and the Secretary's Order was applied uniformly to the entire public domain of the United States. Here, there is no emergency, the Secretary admits that closing half the Kenai National Moose Range to oil and gas leasing is not a withdrawal of public lands, the Secretary was not acting for the President, and the Secretary acted arbitrarily and discriminatorily in closing half the moose range to leasing while leaving the remaining half open to leasing. For all the reasons herein advanced we think it is clear that Haley and the cases therein cited do not support the Secretary's position of absolute discretion to issue or not issue a noncompetitive lease.

Some fairly recent judicial pronouncements by this Court on the subject of the Secretary's discretionary authority in issuing or canceling leases as between conflicting applicants or lessees under the Mineral Leasing Act are illuminating. In McKay v. Wahlenmaier, 96 U.S. App.

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[18] In the decision of the Court below (60 App. D.C. 11, 46 F.2d 217), which was upheld by the Supreme Court, the majority opinion held (at p. 13) that the Secretary's Order constituted a withdrawal and that the withdrawal of the Secretary constituted the withdrawal of the President.

D.C. 313, 226 F.2d 35 (1955), the Court said (at p. 324):

> "We need not examine the validity of the appellant's broad claim that his decisions are unreviewable, for he says in his brief, 'only if the Secretary is indisputably wrong, may he be corrected by a court.' We suppose the term 'indisputably wrong' means 'clearly and indubitably erroneous.' Judged by his own standard, the Secretary's decision here was properly set aside by the trial judge. It was, as we have shown, patently erroneous on all three grounds upon which it was challenged."

In McKenna v. Seaton, 104 U.S. App. D.C. 50, 259 F.2d 780 (1958), certiorari denied October 13, 1958, the Court said (at p. 54):

> "* * * But a fair common denominator, as it were, of the conditions which will cause judicial repudiation of administrative action by the Secretary, is at least that he is plainly wrong. Lane v. Hoglund, 244 U.S. 174, 37 S.Ct. 558, 61 L.Ed. 1066; Chapman v. Santa Fe Pac, R. Co., 90 U.S. App. D.C. 34, 198 F.2d 498. * * *"

In Seaton v. Texas Company, 103 U.S. App. D.C. 163, 256 F.2d 718 (1958), the Court said (at pp. 167-168):

> "There is a wide latitude available to the Secretary in many situations, but he is bound by the statute. * * *
>
> "There is a difference also in the latitude the Secretary possesses depending upon whether the question is factual or legal. * * *
>
> "Some opinions state that the courts have authority to intervene when the duty of the executive officer is ministerial, in which event mandamus will lie. United States ex rel. Barton v. Wilbur, supra; Decatur v. Paulding, supra; Kendall v. United States, 12 Pet. 524, 37 U.S. 425, 9 L.Ed. 1181; Marbury v. Madison, 1 Cranch 137, 5 U.S. 137, 2 L.Ed. 60. But the word 'ministerial' is not sufficiently expressive to denote adequately every situation into which the courts may enter. Indeed, a duty often becomes ministerial only after a court has reached its own judgment about a disputable legal question and its application to a factual situation. Lane v. Hoglund, supra. And see Professor Jaffe's discussion in The Right to Judicial Review I, 71 Harv. L.R. 401 (Jan. 1958)." (Emphasis added; footnotes and citations omitted.)

III

Aside from Appellant's Contention That the Secretary's Regulation Circular 1990 Approved January 8, 1958, is Illegal as Being in Excess of His Statutory Power, the Agreement of July 24, 1958, Closing the Southern Half of The Kenai National Moose Range to Leasing is Invalid For Violating the Procedural Requirements of the Administrative Procedure Act of June 11, 1946 (30 U.S.C. Secs. 1001 et seq.).

Section 4(b) of the Administrative Procedure Act (5 U.S.C. 1003(b)) provides as follows:

> "After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 1006 and 1007 of this title shall apply in place of the provisions of this subsection."

One of the requirements of Section 4(b) is that the agency shall incorporate in any rules adopted a concise statement of their basis and purpose. This the Secretary failed to do in publishing notice in the Federal Register of the agreement of July 24, 1958, closing the southern half of the moose range to leasing (JA 18). The notice reads, in pertinent part, as follows:

> "Notice is hereby given that, pursuant to the regulation 43 CFR, 192.9 (Circular 1990), agreement as reflected by the map herein referred to, has been consumated between the Bureau of Land Management and the United States Fish and Wildlife Service of this Department, designating those lands within the Kenai National Moose Range on the Kenai Peninsula, Alaska, which are hereby closed to oil and gas leasing because such activities would be incompatible with management thereof for wildlife purposes. * * * "

Except for stating as a conclusion that oil and gas leasing in the southern half of the moose range would be incompatible with management thereof for wildlife purposes the notice fails completely to state the factual and

legal basis for this conclusion as well as the real purpose sought to be achieved particularly in the light of the Secretary holding open for oil and gas leasing the northern half of the moose range. In American President Lines, Ltd., et al. v. Federal Maritime Board, ____ U.S. App. D.C. _____ decided May 24, 1962, this Court said (at p. 9, slip copy):

> "* * * We hold that the quoted provision of Section 4(b) of the Administrative Procedure Act applied and that therefore the new order of the Board [an amendment of the existing rule] must, for procedural validity, include or be accompanied by a statement of the basis and purpose of the order."

CONCLUSION

It is submitted that we have demonstrated conclusively in this brief that the Secretary's regulation closing to oil and gas leasing the southern half of the Kenai National Moose Range containing approximately one million acres of public domain lands is inconsistent, out of harmony, and in conflict with the letter, spirit and intent of the Mineral Leasing Act and therefore is illegal, unauthorized and in excess of the Secretary's statutory power. Moreover, the Secretary's action in rejecting appellant's lease offers is arbitrary, unreasonable and capricious and constitutes an invalid and improper exercise of his discretionary authority over the issuance of noncompetitive leases. In attempting to circumvent the Mineral Leasing Act by exercising improperly his discretionary authority over the issuance of leases where he admittedly lacked the power to withdraw the land in suit from leasing, the Secretary was plainly wrong and his action is subject to judicial repudiation as in McKay v. Wahlenmaier and McKenna v. Seaton, supra.

The judgment below should be reversed with instructions to grant plaintiff's motion for summary judgment, to deny defendant's cross-motion for summary judgment, and to grant the relief requested in the complaint.

Respectfully submitted,

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BRIEF FOR THE APPELLANTS

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

GEORGE HALL DOUGLASS	DOCKET No. 17,402
GENE B. GRAHAM	DOCKET No. 17,404
RODNEY L. JOHNSTON	DOCKET No. 17,405
H. WILLARD NAGLEY, JR.	DOCKET No. 17,406
E. E. RASMUSON	DOCKET No. 17,407
MILAN RAYKOVICH	DOCKET No. 17,408
ROBERT B. ATWOOD	DOCKET No. 17,409
Appellants,	
vs.	
STEWART L. UDALL, Secretary, Department of the Interior,	
Appellee.	

Appeals from Judgments of the United States District Court for the District of Columbia

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

QUESTIONS PRESENTED

The Appellee rejected the Appellants offers for oil and gas leases of lands within the Kenai National Moose Range, Alaska, for the reason that the lands were closed to leasing after the Appellants applications were filed, on the ground that leasing would be incompatible with the management of the Range for fish and wildlife purposes.

Dismissal of the cases presents the following questions:

1. Whether Appellees motion to dismiss for failure to state a claim upon which relief can be granted should have been heard as a motion for summary judgment and denied for the reason that genuine issues as to material facts on the question of compatibility are involved.

2. Whether the Appellee acted arbitrarily and capriciously in closing the southern half of the Moose Range.

3. Whether the closing was in fact a withdrawal of the lands from leasing.

4. Whether the Appellee has authority under the Mineral Leasing Act of 1920, as amended, to withdraw lands in the public domain from leasing.

5. Whether the Appellants have vested rights to non-competitive oil and gas leases under the Leasing Act.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

GEORGE HALL DOUGLASS	DOCKET No. 17,403
GENE B. GRAHAM	DOCKET No. 17,404
RODNEY L. JOHNSTON	DOCKET No. 17,405
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Appellants,	
VS.	
STEWART L. UDALL, Secretary, Department of the Interior,	
Appellee.	

Appeals from Judgments of the United States District Court for the District of Columbia

---

BRIEF FOR THE APPELLANTS

OPINIONS BELOW

The court below wrote no opinions. The order dismissing the complaint in this case of George Hall Douglass, which is identical with the orders dismissing the other complaints is printed at J.A. 65.

JURISDICTION

Jurisdiction is founded on the existence of a Federal Question and the amount in controversy, 28 U.S.C. 1958 Ed. Sec. 1331; the Administrative Procedure Act of 1946, 5 U.S.C. 1958 Ed. Sec. 1001 et seq.; and the Mineral Leasing Act Revision of 1960, 30 U.S.C. 1958 Ed. Supp. II, Sec. 226-2, which specifically provides for judicial review of decisions of the Appellee (Am. Complaint 2), the jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1291. This Court has ordered a consolidation of the cases for briefing, printing of the appendix and argument.

BRIEF STATEMENT OF THE CASE

On January 29, 1962, the Appellants filed complaints for judicial review of a decision of the Appellee, Secretary of the Department of the Interior in the case of Richard K. Todd et al., A-28090, A-28311, A-28374, et al., of October 30, 1961, 68 I.D. 291 (Complaint Ex. "A") rejecting Appellants offers for oil and gas leases. (Am. Complaint 1) The Appellants alleged that the closing of 1,070,000 acres of land in the Kenai National Moose Range, Alaska to oil and gas leasing was in fact a withdrawal for which the Appellee has no statutory authority (Am. Complaint 6); that the Appellee acted arbitrarily and capriciously in closing the lands; that oil and gas leasing is not incompatible with the management of the Moose Range for fish and wildlife purposes; and that the Appellants have vested rights to non-competitive oil and gas leases (Am. Complaint 10).

The Appellee filed a motion to dismiss for failure to state a claim upon which relief can be granted. At the hearing of the motion in the District Court on August 2, 1962, the Appellants contended that the motion should be heard as a motion for summary judgment and denied for the reason that genuine issues as to material facts are involved and that as a matter of law the Appellants are

entitled to the relief sought (Tr. Hearing 20, 45). On October 1, 1962 the Appellants appealed from the orders of Judge Tamm on August 7, 1962, dismissing their complaints.

QUESTIONS INVOLVED

The questions raised in the Appellants appeals are:

1. Was the closing of lands in the Kenai National Moose Range, Alaska, from oil and gas leasing under an agreement between the Bureau of Land Management and the U. S. Fish and Wildlife Service, approved by the Appellee on July 24, 1958 (23 F.R. 5883) in fact a withdrawal of the lands?

2. Does the Appellee have authority under the Mineral Leasing Act of February 25, 1920, c. 85,41 Stat. 437, 30 U.S.C. 181 *et seq.*, to withdraw lands in the public domain from oil and gas leasing or did he exceed his statutory authority?

3. Did the Appellee exercise his purported discretion to close or withdraw lands in the Moose Range from leasing in accordance with a finding of facts which demonstrate that such activity would be incompatible with the management of the Range for fish and wildlife purposes or did Appellee act arbitrarily and capriciously?

4. Do the Appellants have vested rights to non-competitive oil and gas leases of lands not within any known geological structure of a producing oil and gas field under Section 17 of the Mineral Leasing Act and regulations which were in effect at the time their offers to lease were filed (43 C.F.R. 192.9, Circular 1945; 20 F.R. 9009) which cannot be cut off by regulations issued and determinations made approximately four years after offers were filed (43 C.F.R. 192.9, Circular 1990; 23 F.R. 227)?

5. Did the Court below err in not hearing the Appellees motions to dismiss as motions for summary judgment and denying motions for the reason that genuine issues as to material facts are involved?

STATEMENT OF FACTS

The Appellants each filed separate offers for non-competitive oil and gas leases of lands not within the known geological structure of a producing oil and gas field in the Kenai National Moose Range, Alaska, in the Anchorage, Alaska, Land Office of the Department of the Interior, pursuant to section 17 of the Mineral Leasing Act, as amended, (30 U.S.C.A. Sec. 226) during the period December 22, 1954 to April 1, 1955. The offers were rejected in whole or in part by the Anchorage office on August 28, 1958 in accordance with an agreement approved by the Appellee on July 24, 1958 (23 F.R. 5883) closing the lands to leasing. (Complaint and Am. Complaint 2 and 3) The action of the Anchorage office was affirmed by the Director, Bureau of Land Management, and the Appellee in his decision of October 30, 1961 in the case of Richard K. Todd et al., (Complaint Ex. "A"). The Appellants were the first person to make application for leases of lands covered in their applications and were qualified to hold leases under the Mineral Leasing Act (Am. Complaint 2, 3, 4).

SUMMARY OF ARGUMENT

1. The Appellee closed 1,070,000 acres of land in the Kenai National Moose Range, Alaska, to oil and gas leasing, under regulations issued under the authority of Sec. 32 of the Mineral Leasing Act, as amended, for the stated reason that leasing would be incompatible with the management of the Range for wildlife purposes.

2. The Appellee contends that the lands were closed in the exercise of his discretionary authority to lease. The Appellants contend that the closing was a withdrawal; that Sec. 32 authorizes the Appellee to issue regulations only to carry out the purposes of the Act, which are to promote the mining of oil and gas, etc., and that the Apellee has no authority to withdraw lands.

3. This case is an appeal from a decision of the Appellee in the case of Richard K. Todd in which he held that "To my knowledge he (the Secretary) has never asserted that he had authority to withdraw land from leasing."

4. The Appellants contend that the power to make needful rules and regulations respecting the territory of the United States is reserved to the Congress under Article IV, Section 3, Clause 2 of the Constitution, subject to a delegation of authority to the President under the Pickett Act of 1910 to make temporary withdrawals of land.

5. The Appellants contend that the Appellee acted arbitrarily and capriciously in closing lands in the Moose Range for the following reasons:

(a) Regulations in effect at the time Appellants offers to lease were filed permitted leasing in the Moose Range and regulations governing withdrawals provided for notice and public hearings.

(b) Hearings were held on the regulations permitting leasing but not on a proposal to withdraw specific lands in the Moose Range from leasing.

(c) Evidence made available on discovery indicates that the decision to close lands in the Moose Range had in effect been made at the time that the hearings were held.

(d) Evidence made available on discovery proves that the management of the Moose Range is compatible for wildlife purposes for the reason that the bulk of the winter range of the Moose lies within the northern half of the Range, which was left open to leasing.

6. The Appellants contend that under the Mineral Leasing Act, as amended by the Leasing Act of August 8, 1946, they have vested rights to the issuance of oil and gas leases on the lands covered by their applications, not within

any known structure of a producing oil and gas field, for the reason that in the amendment of the Act Congress made a distinction between competitive and non-competitive leases, which entitles the first person making an application for a non-competitive lease to a lease, as demonstrated by the legislative history of the Act and,

7. The Appellants contend that the District Court erred in not hearing Appellee's motion to dismiss as a motion for summary judgment and denying motion for the reason that genuine issues as to material facts are involved on the question of compatibility and arbitrary and capricious action.

ARGUMENT

The closing of lands in the Kenai National Moose Range, Alaska from oil and gas leasing was in fact a withdrawal of lands in the public domain from leasing

Approximately 1,070,000 acres of land in the southern half of the Moose Range were closed to leasing under an agreement between the Bureau of Land Management and the U. S. Fish and Wildlife Service, approved by the Appellee on July 24, 1958, (23 F.R. 5883) which states (Complaint Ex. "B") as follows:

> "Notice is hereby given that, pursuant to the regulation 43 C.F.R. 192.9 (Circular 1990) agreement, as reflected by the map herein referred to, *has been consummated* . . ." (Emphasis added)

The defendant in his decision of October 30, 1961, in the case of Richard K. Todd et al., held (Complaint Ex. "A" page 7) that:

> "These formal actions did not purport to be and did not constitute withdrawals of land. They merely formalized exercises of discretion, just as the agreement of July 24, 1958, is."

Notwithstanding the above self serving statement by the Appellee, the lands were closed under regulation 43 C.F.R.

192.9, Circular 1990, 23 F.R. 227, governing withdrawals (Complaint Ex. "H") which provide in part as follows:

> "Sec. 192.9 *Leasing of wildlife refuge lands, game range lands and coordination lands*—(a) *Definitions* (1) *Wildlife refuge lands.* Such lands are those embraced in a withdrawal of public domain and acquired lands of the United States for the protection of all species of wildlife within a particular area. * * *"
>
> "(4) *Alaska wildlife areas.* Such lands are areas in Alaska created by a withdrawal of public lands for the management of natural wildlife resources and administered by the United States Fish and Wildlife Service."
>
> "Sec. 192.9(e). *Lands in requested withdrawal.* All existing offers or applications for oil and gas leases covering lands included in requests for withdrawals for wildlife refuges, game ranges, coordination lands or Alaska wildlife areas, as defined herein, shall be suspended until after the *consummation of the withdrawal,* and thereafter such offers shall be considered in accordance with the provisions of this section." (Emphasis added.)

The use of the words "agreement . . . has been consummated" in the agreement of July 24, 1958, clearly proves that it was intended to consummate a withdrawal as provided for in Section 192.9(e). How can the Appellee assert that he did not withdraw the lands but merely exercised his discretion to lease or not to lease the lands?

The question of what constitutes a withdrawal was considered by this Court in the case of *Wilbur, Secretary of the Interior* v. *United States Ex. rel. Barton,* 60 U.S. App. D.C. 11, 46 F. 2d 217. On March 13, 1929, the Department of the Interior sent instructions to all local land offices not to receive further applications for permits to prospect for oil and gas on the public domain and to reject all applications pending in accordance with a statement issued by the White House to the effect that, "there will be com-

plete conservation of government oil in this administration."

The Court said at page 219:

> "Did the orders of the Secretary of the Interior amount to a temporary withdrawal of the public land from location, entry and exploration for the purpose of discovering oil or gas; and, assuming the withdrawal, did the mere filing of an application for a prospecting permit initiate a right in the applicant that could not be affected by the withdrawal?
>
> "There can be no doubt that the effect of the orders issued by the Secretary was to withdraw from further location, entry, and exploration for the discovery of oil and gas all public lands, and that the purpose of such withdrawal was to meet conditions due to great overproduction and to conserve oil and gas in the public interest.
>
> "The next question to be determined is whether the withdrawal of the Secretary was the withdrawal of the President."

The Court upheld the authority of the President to make temporary withdrawals under the Pickett Act of June 25, 1910, c. 421, 36 Stat. 847, 848; 43 U.S.C. Secs. 141, 143, and said at pages 221, 222

> "In the present case, his orders issued through the Secretary were intended to meet an emergency occasioned by the great overproduction of oil and gas, the waste incident thereto, and other public considerations."

The Supreme Court in the case of *United States Ex. rel. McLennan* v. *Wilbur*, 283 U.S. 414, 51 S. Ct. 502, 75 L. Ed. 1148, affirmed the above case. The Court did not declare the precise meaning of Section 13 of the Mineral Leasing Act of 1930, but held that it was susceptible of the construction which leaves the Secretary discretion to reject applications for permits in pursuance of the policy of the Presi-

dent to conserve oil and the right of the President to withdraw public lands under the Pickett Act of 1910.

The appellants' cases are distinguished from the decision of the Supreme Court in the Wilbur case in the following respects

In the *Wilbur* cases the Secretary acted in accordance with the policy of the President who had authority under the Pickett Act of 1910 to make temporary withdrawals. In the Appellants' cases, the Appellee issued the regulations on January 8, 1958, 43 C.F.R. 192.9, Circular 1990, 23 F.R. 227, authorizing the withdrawal of lands, under the authority of Sec. 32 of the Mineral Leasing Act of 1920, 41 Stat. 450, 30 U.S.C.A. 189 (Complaint Ex. "H"). The Appellee admits that he has no authority to withdraw lands under the Mineral Leasing Act, J.A. 36.

In the *Wilbur* cases there was an overproduction of oil which justified the Secretarys action in the public interest. Senate Report No. 1392, 79th Congress 2d Session on Senate Bill S. 1236, later enacted as the Leasing Act of August 8, 1946, c. 916, 60 Stat. 951, 30 U.S.C.A. 226, states that:

> "The bill is designed to stimulate the discovery of new petroleum reserves; to promote the development of oil and gas on some 300,000 square miles of potential oil lands of the public domain; to grant incentives which will bear as their rewards American leadership in industry and world affairs."

A presidential proclamation No. 3279 by President Dwight D. Eisenhower on mandatory oil import controls, in effect at the time the Appellee withdrew the lands in the Moose Range states that:

> "The new program is designed to insure a stable, healthy industry in the United States, capable of exploring for and developing new hemisphere reserves to replace those being depleted. The basis of the new program, like that of the voluntary program, is the certified requirements of our national security which

> make it necessary that we preserve to the greatest extent possible a vigorous, healthy petroleum industry in the United States."

The Appellee's action in closing the lands was in fact a withdrawal for which he has no authority, contrary to the policy of Congress and the President, and not in the public interest. Clearly the facts and applicable law of the *Wilbur* cases, involving a temporary suspension of prospecting permits, are not applicable to the action of the Appellee in creating permanent fish and wildlife lands in the Moose Range.

The appellee does not have authority under the Mineral Leasing Act of 1920, as amended, to withdraw lands

Article IV, Section 3, Clause 2 of the Constitution provides that:

> "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory of the United States."

Pertinent provisions of the Pickett Act of June 25, 1910, c. 421, 36 Stat. 847, 848; 43 U.S.C. Secs. 141 and 143 are as follows:

> "The President may at any time, in his discretion temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States including the District of Alaska and reserve same for waterpower sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.
>
> "Sec. 3. That the Secretary of the Interior shall report all such withdrawals to the Congress at the beginning of the next regular session after the date of withdrawal."

The Pickett Act was enacted at the request of President Taft in a special message to Congress on September 27,

1909, creating the Teapot Dome, as a "temporary withdrawal in aid of proposed legislation affecting the use and disposition of petroleum deposits on the public domain. The House Committee Report on the Pickett Act of 1910, No. 983, 61st Congress, stated:

> "No statute has been found expressly conferring this authority (*id est,* to withdraw public lands), and the extent thereof has not been settled by the Supreme Court."

The Pickett Act authorizes temporary withdrawals only, which must be reported to the Congress, thereby carefully retaining in the Congress the power granted by Article IV, Clause 2, Section 3 of the Constitution. (Am. Complaint 4)

The regulations under which the Appellee closed or withdrew lands in the Moose Range from leasing (43 C.F.R. 192.9, Circular 1990; 23 F.R. 227), were issued under the authority of Sec. 32 of the Mineral Leasing Act of 1920, c. 85, 41 Stat. 450; 30 U.S.C.A. 189, which authorizes the Secretary of the Interior to prescribe necessary and proper regulations to carry out the purposes of the Act as follows:

> "Sec. 32. That the Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this Act, . . ."

The purposes of the Mineral Leasing Act of 1920, as amended, are:

> "An Act to promote the mining of coal, phosphate, oil, oil shale, gas and sodium on the public domain."

The regulations issued by the Appellee on January 8, 1958 (43 C.F.R. 192.9, Circular 1990; 23 F.R. 227), authorizing the closing or withdrawing of lands from leasing and the agreement of July 24, 1958, 23 F.R. 5883, closing or withdrawing lands in the Moose Range from leasing are inconsistent and in conflict with the purposes of the

Act. They go far beyond that which is "necessary and proper . . . to carry out the purposes of the Act", which is to promote the production of oil and gas. The Supreme Court has ruled in a number of cases that a regulation out of harmony with a statute is a nullity. *Maryland Casualty Company* v. *United States*, 251 U.S. 342, 40 S. Ct. 155, 64 L. Ed. 297; *Miller* v. *United States*, 294 U.S. 435, 55 S. Ct. 440, 79 L. Ed. 977; *Manhattan General Equipment* v. *Commissioner*, 297 U.S. 129, 56 S. Ct. 397, 80 L. Ed. 528.

In the *Miller* case the court said at pages 439-440:

> "It (the administrative regulation) is invalid because not within the authority conferred by the statute upon the Director (or his successor, the Administrator) to make regulations to carry out the purposes of the Act. It is not, in the sense of the statute, a regulation at all, but legislation * * *. This is beyond administrative power. *The only authority conferred or which could be conferred by the statute is to make regulations to carry out the purposes of the Act.* (Emphasis added)

In the *Manhattan* case the Court said at pages 134-135:

> "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. *A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity.* * * * And not only must a regulation in order to be valid, be consistent with the statute, but it must be reasonable. * * * The original regulation as applied to a situation like that under review is both inconsistent with the statute and unreasonable." (Emphasis added) (Am. Complaint 6)

The appellee admits that he has no authority under the Mineral Leasing Act of 1920 to withdraw lands

The Appellee states in his decision in the case of *Richard K. Todd, et al.*, 68 I.D. 291, J.A. 36, that:

> "Aside from Executive Order No. 10355, the Secretary has only limited statutory authority to withdraw public lands, e.g., 43 U.S.C., 1958 ed., Sec. 300 (stock-driveway withdrawals), and 43 U.S.C., 1958 ed., Sec. 416 (reclamation withdrawals). To my knowledge he has never asserted that he had authority under the Mineral Leasing Act to withdraw lands from leasing."

The Withdrawal and Reservation of Federal Lands under Executive Order 10355 of May 26, 1952, 17 F.R. 4831 is governed by regulations approved by the Secretary of the Interior on August 12, 1957, 43 C.F.R. 295, Circular 1982, 22 F.R. 6613 (Complaint Ex. "G"). These regulations provide for notice and public hearings prior to making withdrawals (Am. Complaint 8, 9).

There is no basic difference between the action of the Secretary on March 13, 1929 in rejecting applications for permits and the action by the Secretary under the Agreement of July 24, 1958 closing lands in the Moose Range to leasing. This Court in the *Wilbur* case held that such action constituted a withdrawal. The Appellee in this case cites the Mineral Leasing Act, as amended, as authority for the regulations under which the lands were closed or withdrawn. Clearly this Act does not authorize such action. In fact the Appellee admits in his answer to question 17 of the Appellants' request for admissions that only technically the closing of the southern half of the Moose Range did not constitute a withdrawal.

The appellee acted arbitrarily and capriciously in closing or withdrawing the southern half of the Moose Range from leasing

The Appellants made a motion for discovery of the record of conferences between the Bureau of Land Management and the United States Fish and Wildlife Service, which resulted in the closing of lands in the Moose Range. Only six (6) memoranda were produced. The first five (5), dated August 30, September 19, 25 and 30 and November 1, 1957 were all between offices of the Director Bureau of Sport Fisheries and Wildlife, Washington, D. C. and local wildlife service offices in Alaska. (Tr. 34), J.A. 56.

The counsel for the Appellee at the hearing of the motion to dismiss stated that "while the record of these (conferences) are skimpy, there is a two-volume report of the hearing which was held at which proponents and opponents of the measure to close this portion of the range were heard. (Tr. 50) The hearing referred to was on a proposed revision of regulations 43 C.F.R. 192.9 (Complaint Ex. "D") in effect at the time Appellants' offers to lease were filed, which permitted leasing of wildlife refuge lands. The proposed revision authorized the closing or withdrawal of wildlife lands without following the Appellee's regulation 43 C.F.R. 295, governing the withdrawal and reservation of Federal Lands (Complaint Ex. "G") which provide for notice and hearings on withdrawals. The hearing held was not on a proposal to withdraw specific lands in the Moose Range. Notice of the hearing was published in the Federal Register of October 11, 1957 (22 F.R. 8088), the hearings were held on December 9 and 10, 1957 and the revised regulations 43 C.F.R. 192.9, Circular 1990, 23 F.R. 227, (Complaint Ex. "H") were approved January 8, 1958. The revision of the regulations to authorize the closing of lands in the Moose Range after a decision had in fact been made to close the southern half of the range was arbitrary and capricious.

In addition to the memoranda referred to above the Appellee produced a draft memorandum from the Assistant Secretary of the Department of the Interior dated January 16, 1958 to the Secretary of the Interior which states in part as follows (Tr. 22, 23) J.A. 48:

> "In interpreting the classification of the Bureau of Sport Fisheries and Wildlife, it should be recalled that no single section of land here takes care of the year-round habitat requirements of the Moose. The Moose, through centuries of use are conditioned to certain definite wintering grounds, summer range, and preferred calving and feeding areas and instinctively resort to the various types of areas required. In the over-all reserve of wildlife lands held out from oil and gas production here, all of the giant Kenai Moose requirements are well met with the exception of winter range. Unfortunately, the bulk of the winter range lies in the area where oil and gas has been found, and geological evidence points to further findings of oil and gas in this portion of the Range."

The Appellee in answer to Questions 18 and 20 of the Appellants' requests for admissions denied that the keeping of the northern half of the Moose Range open to leasing clearly indicates that oil and gas leasing is compatible with the management of the entire Range including the southern half. The finding in the Agreement of July 24, 1958 that oil and gas leasing is incompatible with the management of the southern half of the Range is not supported by facts. The closing of the southern half by drawing an almost east-west line across the Range is prima facie arbitrary and capricious, especially when the fact that the bulk of the winter range which is most important lies in the northern half of the Range.

The appellants have vested rights to non-competitive oil and gas leases on the lands covered by their offers not within any known structure of a producing oil or gas field

A comparison of pertinent provisions of Sections 13 and 17, relating to the issuance of oil and gas leases under the original Mineral Leasing Act of 1920, c. 85, 41 Stat. 437, 441, 443, as amended by the Act of August 21, 1935, c. 599, 49 Stat. 674, 676 and the Act of August 8, 1946, c. 916, 60 Stat. 950, 1951, are as follows:

SECTION 13

Act of February 25, 1920, Sec. 13.

". . . That the Secretary of the Interior is hereby authorized under such necessary and proper rules and regulations as he may prescribe, to grant any applicant qualified under this Act a prospecting permit, . . . on lands which . . . *are not within any known structure of a producing oil and gas field* . . ." (Emphasis added.)

Act of August 21, 1935, Sec. 13.

". . . That the Secretary of the Interior is *hereby authorized, and directed* . . . to grant a prospecting permit to the first applicant . . . provided, that said application was filed ninety days prior to the effective date of this amendatory Act . . . Provided further, that any application for a prospecting permit filed after ninety days prior to the effective date of this amendatory Act shall be considered as an application for a lease under Section 17 hereof . . ." (Emphasis added.)

SECTION 17

Act of February 25, 1920, Sec. 17.

". . . That all unappropriated deposits of oil and gas situated within the *known geological structure of a producing oil and gas field* and the entered lands containing the same, not subject to preferential lease, *may be leased* by the Secretary of the Interior to the highest responsible bidder by competitive bidding under general regulations . . ." (Emphasis added).

Act of August 21, 1935, Sec. 17.

". . . All lands subject to disposition under this Act which *are known or believed to contain oil and gas deposits,* except as hereinafter provided, *may be leased* by the Secretary of the Interior after the effective date of this amendatory Act, to the highest responsible qualified bidder by competitive bidding under general regulations . . ." (Emphasis added.)

". . . Provided further, that a person first making application for a lease of any lands not within any known geological structure of a producing oil or gas field who is qualified to hold a lease under this Act, including applicants for permits whose applications were filed after ninety days prior to the effective date of this Act, *shall be entitled to a preference right* over others to a lease of such lands without competitive bidding . . ." (Emphasis added.)

Act of August 8, 1946, Sec. 17.

"All lands subject to disposition under this Act *which are known or believed to contain oil or gas deposits may be leased* by the Secretary of the Interior. When such lands *to be leased* are *within any known geological structure of a producing oil and gas field,* they shall be leased to the highest responsible bidder by competitive bidding under general regulations . . ." (Emphasis added.)

"When the lands *to be leased* are not within *any known structure of a producing oil or gas field,* the person first making an application who is qualified to hold a lease under this Act *shall be entitled to a lease* of such lands without competitive bidding . . ." (Emphasis added.)

The original Leasing Act recognized two categories of permits and leases, set out in separate sections 13 and 17 of the Act as follows:

1. Wildcat or non-competitive permits on lands ". . . not within any known geological structure of a producing oil or gas field . . ." and

2. Proven or competitive leases on lands "... within the known structure of a producing oil and gas field ..."

On August 21, 1935, Section 17 of the Leasing Act was amended to cover both competitive and non-competitive leases as follows:

> "... All lands subject to disposition under this Act which are *known or believed* to contain oil and gas deposits, except as hereinafter provided, may be leased by the Secretary of the Interior to the highest responsible bidder by competitive bidding under general regulations ..."

These were the same lands described in the Original Act as lands "within the known geological structure of a producing oil or gas field. Thus the lands *known or believed* to contain oil and gas formed a complete category of lands which may be leased by the Secretary in his discretion under competitive bidding.

As to the other category of wildcat or non-competitive leases, the 1935 Act amended Section 13 to provide that any application for a prospecting permit shall be considered as an application for a lease under Section 17 as follows:

> "... Provided further that the person first making application for the lease of any lands not within any known geological structure of a producing oil or gas field who is qualified to hold a lease under this Act ... shall be entitled to a preference right over others to a lease of such lands without competitive bidding."

These were the same lands described in the Original Act as *not within any known structure of a producing oil and gas field* on which prospecting permits were granted. Under the 1935 Act the first person making application was entitled to a *preference right* to a lease on these lands.

Section 17 of the Original Act was again amended on August 8, 1946 to read with respect to competitive leases:

> "All lands subject to disposition under this Act which are *known or believed* to contain oil or gas deposits may be leased by the Secretary of the Interior. When such lands to be leased are within any known geological structure of a producing oil and gas field, they shall be leased to the highest responsible bidder by competitive bidding under general regulations."

These are the same lands described in the Original Act as *within the known geological structure* of a producing oil and gas field and in the 1935 Act as lands *known or believed to contain oil and gas* deposits which the Secretary may lease by competitive bidding.

The fact that Congress in 1946 referred to these lands in two short sentences instead of one long sentence does not change the identity of the lands which *may be leased.*

The 1946 Act amended Section 17 of the 1935 Act with respect to wildcat or non-competitive leases to read:

> "When the lands to be leased are not within any known structure of a producing oil and gas field, the first person making application who is qualified to hold a lease under this Act *shall be entitled to a lease without competitive bidding.*"

It is pointed out that the 1946 Act eliminated the words "shall be entitled to a preference right" and substituted the words "shall be entitled to a lease." The intent of Congress to give the first applicant a vested right to non-competitive lease is shown by Senate Report 1392, 79th Congress on Senate Bill S. 1236, p. 12, which originally contained the words "shall be entitled to a preference right over others" whereas the Bill as finally enacted substituted the words "shall be entitled to a lease."

The words in the 1946 Act "may be leased" do not apply to wildcat or non-competitive leases since neither

in the original Act nor any of the amendments are lands subject to such leases, known or believed to contain oil. A lessee can only hope that he will find oil and gas. No one can know or believe that non-competitive or wildcat lands have oil and gas until a well has been drilled and oil sands found.

The Department of the Interior recognizes that the words "known or believed" refer only to competitive leases

The Assistant Secretary of the Interior Oscar L. Chapman wrote a letter to the Hon. Carl A. Hatch, Chairman, Committee on Public Lands, on March 15, 1946 on S. Bill 1236, later enacted as the Act of Aug. 8, 1946. The letter said in part:

> "Briefly the proposed changes in the bill are as follows:
>
> '2. Only lands in the known geological structure of producing oil or gas fields would be subject to competitive bidding. Now any lands *known or believed* to contain oil or gas may be leased competitively.'
>
> "I see no justification for limiting the right to lease lands by competitive bidding to known structures of producing oil or gas fields, as proposed in the second sentence of section 17 of the bill. Under the present law the Secretary of the Interior is authorized to lease by competitive bidding lands *known or believed* to contain oil or gas. The real extent of oil and gas structures prior to complete development is often difficult to determine with any degree of precision. Conferring upon the Secretary authority to lease by competitive bidding lands known or believed to contain oil or as affords sufficient latitude to sell competitively to the highest bidder lands which, although technically improved, are recognized by geologists as valuable for oil and gas."

What could be clearer to show that the words "may be leased" and "known or believed" in the 1946 Act refer only to competitive leases and not to non-competitive leases

and that the person first making application for a non-competitive lease, who is qualified to hold a lease has a vested right to the issuance of a lease, which the Appellee has no discretionary authority to deny. Clearly lands within the known geological structure of a producing oil or gas field are known or believed to contain oil and gas deposits. If lands are not within the known structure, they cannot be known or believed to contain oil and gas.

The Appellee relies wholly on the case of *Haley* v. *Seaton*, 108 U.S. App. D.C. 257, 281 F. 2d 620, to show that the Appellants do not have vested rights to non-competitive leases and that the Appellee has discretionary authority to issue or deny a lease.

In the *Haley* case the Secretary rejected the offers to lease on the ground that by the Act of Sept. 2, 1958, 72 Stat. 1686, P.L. 85-868 of Sept. 2, 1958, Congress had placed the lands within the boundaries of the Navajo Reservation and they were therefore not available for leasing.

The Court said:

> "Since the application for leases had not been accepted by the Secretary at the time the Act of Sept. 2, 1958 was enacted, Congress under its Constitutional power to make all needful rules and regulations respecting 'the public lands' had the power to withdraw the lands described in such applications from the public domain and restore them to the Navajo Reservation, if they were not then a part of such Reservation."

The Court cited the Constitution of the U.S., Art. IV, Section 3, Clause 2, showing that only Congress has the power to make rules and regulations governing withdrawals of public lands from leasing, which it has done under The Pickett Act of 1910.

In the *Haley* case, the court discussed the discretionary authority of the Secretary to issue leases, on the assumption

that the lands were in the public domain. The Appellants contend that this discussion is obiter dicta not binding on this Court. Furthermore, the court in the *Haley* case did not interpret the precise meaning of the words "known or believed" in the 1946 Act or the relationship of the words "may be leased" to competitive and non-competitive leases. The Appellants contend that the *Haley* case is not binding on this Court in this case and that they have vested rights to non-competitive leases, for the reasons stated above.

The counsel for the Appellee recognizes the fact that this Court based its decision in the *Haley* case that the lands involved were Indian Lands not subject to leasing but contends that the obiter dicta in the *Haley* case is binding on this Court. (Tr. Hearing Motion 17). The Appellants submit that this Court should re-examine the *Haley* case with respect to the obiter dicta language of the decision.

The Court below erred in not hearing appellee's motion to dismiss as a motion for summary judgment and denying motion for the reason that genuine issues as to material facts are involved

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides that:

> "If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleadings to state a claim upon which relief can be granted, matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given a reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

The Appellant, Robert A. Atwood, filed a motion for discovery on March 8, 1962. The Appellants filed requests for admissions on May 7, 1962, J.A. 22, which were answered

by the Appellee on June 15, 1962, J.A. 27. The Appellants filed nine (9) affidavits on July 19, 1962 to prove that oil and gas leasing is compatible with the management of the southern half of the Moose Range for fish and wildlife purposes. None of this material was excluded by the court below. The Appellants contend that this evidence conclusively proves that genuine issues as to material facts are involved on the issue of compatibility and whether the Appellee acted arbitrarily and capriciously in closing the southern half of the Moose Range. There is no record that the court below examined these affidavits to determine the issue of compatibility and whether the Appellee acted arbitrarily and capriciously in closing the southern half of the Moose Range.

This Court held in the case of *Callaway* v. *Hamilton Nat. Bank of Washington, et al.*, 90 U.S. App. D.C. 228; 195 F. 2d 556, 559 (1952), that:

> "In dealing with the record on this appeal, however, we must observe the usual rule that on a motion to dismiss, the plaintiff's allegations are to be taken as true and all reasonable favorable inferences arising therefrom are to be indulged. Dioguardi v. Dunning, 2 Cir., 139 F. 2d 774. A motion to dismiss should not be sustained 'unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim' set forth by the plaintiff." *Dennis* v. *Village of Tonka Bay*, 8 Cir., 151 F. 2d 411, 412, see also *Dollar* v. *Land*, 81 U.S. App. D.C. 28, 154 F. 2d 307, affirmed 330 U.S. 731.

The Court in the case of *Winter Park Telephone Co.* v. *Southern Bell Telephone & Telegraph Co.*, 5 Cir., 181 F. 2d 341, 342, said:

> "The facts and circumstances, although in no material dispute as to their actuality, reveal aspects from which inconsistent hypothesis might reasonably be drawn and as to which the minds of reasonable men might differ."

"The judgment (summary judgment) is, accordingly reversed and the cause is remanded for making specific findings of facts in the record or from a trial of the issues in due course as the Court may deem advisable." Parenthesis added.

The Court in the case of *Stephens* v. *Howard D. Johnston Co.*, 4 Cir., 181 F. 2d 390, 394 (1950), said:

"The motion for summary judgment, authorized by Rule 56, Federal Rules of Civil Procedure, 28 U.S.C.A., which, in effect legalizes the 'speaking' demurrer, has an important place in providing a prompt disposition of cases which have no possible merit and in preventing undue delays in the trial of actions to which there is no real defense; but it should be granted only when it is perfectly clear that no issue of fact is involved and inquiry into the facts is not desirable to clarify the application of the law. Shea v. Second Nat. Bank of Washington, 76 U.S. App. D.C. 406; 133 F. 2d 17, 22. (Other citations omitted.) And this is true even where there is no dispute as to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom. (Citations omitted.) As was said by Mr. Justice Jackson, speaking for the Supreme Court, in Sartor v. Arkansas Nat. Gas Co., 321 U.S. 620, 627, Rule 56 authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite true what the truth is, that no genuine issue remains for trial, and that the purpose of the rule is not to cut litigants off from their right to trial by jury if they really have issues to try.'"

In the case of *Wittlin* v. *Giacalone, et al.*, 81 U.S. App. D.C. 20, 154 F. 2d 20, 21 (1946), the Court said:

"We are compelled to that conclusion because it is well established that one who moves for summary judgment has the burden of demonstrating clearly the absence of any genuine issue of fact, and that any doubt as to the existence of such an issue is resolved against the movant. The courts are quite critical of the papers presented by the moving party, but not of the opposing papers."

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the court below for the Appellee be reversed and that the Appellants' cases be remanded for reconsideration.

Respectfully submitted,

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Brief for Stewart L. Udall, Secretary of the Interior, Appellee

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,358

BERT F. DUESING, APPELLANT,

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR, APPELLEE

GEORGE HALL DOUGLASS,	No. 17,403
GENE B. GRAHAM,	No. 17,404
RODNEY L. JOHNSTON,	No. 17,405
H. WILLARD NAGLEY, JR.,	No. 17,406
E. E. RASMUSON,	No. 17,407
MILAN RAYKOVICH,	No. 17,408
ROBERT B. ATWOOD, APPELLANTS,	No. 17,409
v.	
STEWART L. UDALL, SECRETARY OF THE INTERIOR, APPELLEE	

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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QUESTIONS PRESENTED

1. Whether Section 17 of the Mineral Leasing Act confers upon the Secretary of the Interior the discretion to determine whether certain public domain shall or shall not be leased.

2. Whether the Secretary of the Interior's determination, after hearings and discussions with interested parties, not to lease land to anyone, can be attacked as arbitrary and capricious.

3. Whether Section 4 of the Administrative Procedure Act is applicable to regulations of the Secretary of the Interior relating to public land.

4. Whether the Secretary of the Interior's determination not to lease public land for oil and gas constitutes a withdrawal.

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APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR STEWART L. UDALL, SECRETARY OF THE INTERIOR, APPELLEE

INTRODUCTORY STATEMENT

Although not all of the appeals have been consolidated by appellants for briefing, the facts and the applicable law are identical in all of the cases. Accordingly, the Government has filed this single brief in answer to the two briefs filed by appellants. The Joint Appendix references,

unless otherwise noted, are to the *Duesing* case, No. 17,358, for convenience. In the few instances where appellants present separate and distinct arguments, reference will be made by name, i.e., *Duesing* and *Atwood,* the latter being the name of the particular case set forth fully in the Joint Appendix for the consolidated cases.

OPINION BELOW

The district court delivered an oral opinion in No. 17,358, which is set forth at pages 55-57 of the Joint Appendix.

JURISDICTION

The jurisdiction of the district court was invoked under Title 11, Section 306, of the District of Columbia Code; 5 U.S.C. secs. 1001 *et seq.;* and 30 U.S.C. sec. 226-2. Jurisdiction of this Court rests on 28 U.S.C. sec. 1291.

STATEMENT

These are appeals from judgments affirming the decision of the Secretary of the Interior not to lease for oil and gas purposes certain land within the Kenai National Moose Reserve on the Kenai Peninsula in Alaska and the resultant rejection of appellants' applications. A chronological statement of the relevant facts follows.

The Moose Reserve was established December 16, 1941, by Executive Order No. 8979 (6 Fed. Reg. 6471). On December 8, 1955, the Secretary, by regulation, with respect to the leasing of wildlife refuge lands, provided that certain areas, including portions of Alaska not here relevant, were determined to be "indispensable for the preservation of rare or endangered species, remnant big game herds," and other classifications "are not available for leasing." After specifying that the areas so closed were the areas "at present" in that category, the regulations went on to state: "Oil and gas leases may be issued for other lands administered by the Fish and Wildlife Service" (Jt. App. 11).

Between December 1955 and January 1958, the advisability of leasing wildlife areas for oil and gas was be-

ing considered by the Fish and Wildlife Service, the Bureau of Land Management, and the Committee on Merchant Marine and Fisheries of the House of Representatives. Between February 1956 and January 1958, action on applications for leases covering such areas was suspended (Jt. App. 40). In October 1957, notice was published in the Federal Register (22 Fed. Reg. 8088) that all or part of the Alaska wildlife areas might be closed to leasing and hearings were held on December 9 and 10 concerning this matter (Jt. App. 40).

Prior to January 10, 1958, appellants had filed applications for the oil and gas leases involved in this litigation. On January 10, 1958, before any action had been taken by the Bureau of Land Management on the applications, the Secretary amended 43 C.F.R. 192.9, defining "Alaska Wildlife Areas," to include "areas in Alaska created by a withdrawal of public lands for the management of natural resources and administered by the United States Fish and Widlife Service" and providing that "all pending offers or applications for oil and gas covering * * * Alaska wildlife areas, will continue to be suspended until" the Secretary of the Interior has approved an agreement between the Fish and Wildlife Service and the Bureau of Land Management "specifying those lands which shall not be subject to oil and gas leases" (Jt. App. 15-17).

On July 24, 1958, the Secretary approved the agreement between the Fish and Wildlife Service and the Bureau of Land Management, and ordered the southern half of the Kenai National Moose Reserve "closed to oil and gas leasing because such activities would be incompatible with management thereof for wild life purposes" (Jt. App. 18).

Subsequently, all of the applications were rejected and the rejection affirmed by the Secretary of the Interior by decision of October 30, 1961 (Jt. App. 28-44). The basic grounds of the decision were that the directive of July 24, 1958, relied on for rejecting the applications, was an exercise by the Secretary of the discretionary authority to lease or not lease for oil and gas, conferred on him by Section 17 of the Mineral Leasing Act (Jt. App. 37-38),

and that the mere filing of an application for an oil and gas lease did not deprive the Secretary of that discretionary authority (Jt. App. 38-39).

These proceedings to review the Secretary's determination were filed in the district court on January 26, 1962 (Jt. App. 2-9). The district court, in the *Duesing* case, granted defendant's motion for summary judgment, Judge Holtzoff stating (Jt. App. 56-57):

> The statute involved here was recently construed by the Court of Appeals for the District of Columbia in Haley v. Seaton, 108 App. D.C. 257 at 260 and 261. The Court held in that case that a person first making an application acquires a preference right as against third persons but no vested rights against the United States, and the Court further states that in its opinion the Secretary of the Interior had discretion to accept or reject the applications for leases.
>
> * * * * *
>
> The Secretary of the Interior, of course, as any other Government official, had a right to change his mind, unless, indeed, any vested rights had intervened. The fact is that no vested rights intervened here.
>
> It is argued that it was unreasonable and arbitrary for the Secretary to change his mind and withhold the property from leasing. The Court is unable to discern anything of an arbitrary or unreasonable character in the action of the Secretary. He took the step involved here after investigations, hearings and conferences with various interested parties. Surely the Court may not substitute its discretion for that of the Secretary of the Interior.

Judgment was entered July 23, 1962 (Jt. App. 58). This appeal followed (Jt. App. 58).

The district court (Judge Tamm) in the *Atwood, et al.* cases granted defendants' motions to dismiss and entered judgments on August 7, 1962 (Atwood Jt. App. 65). These appeals followed (Atwood Jt. App. 66).

STATUTES INVOLVED

Section 4 of the Administrative Procedure Act, 5 U.S.C. sec. 1003, provides in pertinent part as follows:

> Except to the extent that there is involved * * * (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts——.

Section 17 of the Mineral Leasing Act, 60 Stat. 951, 30 U.S.C. sec. 226, provides in pertinent part as follows:

> All lands subject to disposition under this Act which are known or believed to contain oil or gas deposits may be leased by the Secretary of the Interior. When the lands to be leased are within any known geological structure of a producing oil or gas field, they shall be leased to the highest responsible qualified bidder by competitive bidding * * *. When the lands to be leased are not within any known geological structure of a producing oil or gas field, the person first making application for the lease who is qualified to hold a lease under this Act shall be entitled to a lease of such lands without competitive bidding. * * *

SUMMARY OF ARGUMENT

I

Section 17 of the Mineral Leasing Act confers upon the Secretary of the Interior discretion whether to lease or not lease for oil and gas purposes land subject to disposition under the Act. For this reason, the mere filing of an application for a lease gives rise to no rights in the applicant against the United States until the Secretary has finally determined to lease the land. The application only gives the applicant a priority over later applicants if the Secretary determines to lease the land.

II

The Secretary's determination not to lease the land cannot be said to be arbitrary or capricious as it was made only after discussion with other government agencies and hearings at which interested parties presented their views.

III

Section 4 of the Administrative Procedure Act pertaining to "rule making" expressly excepts rule making relating to public property and public land is public property. In any event, exercise of discretion not to lease by the Secretary of the Interior is not rule making.

IV

The exercise by the Secretary of the Interior of his discretion not to lease the lands in question is not a withdrawal of the lands.

ARGUMENT

I

The Secretary's Determination Not to Lease the Designated Areas Within the Kenai National Moose Reserve Is Unimpeachable As An Exercise of Discretion Conferred on Him by Section 17 of the Mineral Leasing Act

Fundamentally, appellants' position rests on a denial of the well-established discretionary authority to lease conferred on the Secretary of the Interior by Section 17 of the Mineral Leasing Act. That Act states:

> All lands subject to disposition under this Act which are known or believed to contain oil and gas deposits *may be leased* by the Secretary of the Interior. [Emphasis added.]

Unquestionably, when the applications for leases were filed, the Secretary had the discretionary authority to lease the lands covered by the applications. But appellants would convert this discretion to a mandate once their applications

were filed. There is no support for such a position. The statute provides that the land *may* be leased, not must be leased. No useful purpose would be served by an extended discussion of the history of the Mineral Leasing Act. This Court has many times considered that Act and its history, and each time affirmed the principle that whether certain land would be leased is a matter within the discretion of the Secretary of the Interior. *Haley* v. *Seaton*, 108 U.S. App.D.C. 257, 281 F.2d 620 (1960); *Wann* v. *Ickes*, 67 App. D.C. 215, 92 F.2d 215 (1937); *Jordan* v. *Ickes*, 79 U.S.App. D.C. 114, 143 F.2d 152 (1944), cert. den., 320 U.S. 801; *Roughton* v. *Ickes*, 69 App.D.C. 324, 101 F.2d 248 (1938); *Dunn* v. *Ickes*, 72 App.D.C. 325, 115 F.2d 36 (1940), cert. den., 311 U.S. 698. These decisions set forth clearly the distinction between mandate and discretion established by Congress in the Mineral Leasing Act, which was first explained and approved in *United States* v. *Wilbur*, 283 U.S. 414 (1931). This Court, in *Haley* v. *Seaton*, put the matter succinctly (281 F.2d at p. 625):

> We are of the opinion that the 1946 amendment in nowise limited such power in the Secretary of the Interior and continued his discretionary power either to grant or reject applications for leases. As observed above, the phrase in § 17 of the Mineral Leasing Act of 1920, as originally enacted, reading "may be leased by the Secretary of the Interior" was not changed by the Amendment of August 8, 1946. It was carried into the amendatory Act. The provision for the leasing of lands within a known geological structure and lands not within any known geological structure applies only to lands "to be leased," plainly implying that the Secretary of the Interior was to determine what lands were to be leased. Accordingly, we conclude that the acceptance or rejection of the applications to lease here involved was a matter resting within the discretion of the Secretary of the Interior.

The distinction between discretion and mandate and the conclusion that the Secretary's discretion with respect to

disposition of public land remains until he has finally made disposition have been reaffirmed recently by this Court in a case involving the Isolated Tracts Act. *Willcoxson* v. *Udall,* Nos. 16712-16715, decided January 4, 1963. Therein this Court described Section 17 of the Mineral Leasing Act as conferring the same sort of discretion.

Appellant Duesing simply ignores the foregoing basic principles and states that the Secretary of the Interior has no such discretion. The only support offered for the statement is extensive quotations from the late Senator O'Mahoney (Duesing Br. 19-21). It is enough to say that these quotations represent the views of Senator O'Mahoney, and not those of Congress. Indeed, they do not even purport to indicate the intent of Congress in passing the 1946 amendment to Section 17, which expressed clearly the discretionary authority of the Secretary of the Interior. The Senator's comments were made in 1958 and 1959, long after the 1946 amendment, and it is worthy of note that, although the Mineral Leasing Act was again amended in 1960, Section 17 was left substantially intact, retaining the discretion of the Secretary.

Appellant Atwood seeks to deny the discretionary nature of the Secretary's authority to lease lands, set forth clearly in the language of this Court in *Haley* v. *Seaton, supra,* p. 7, with the bold assertion (Atwood Br. 16-20) that the only land "known or believed to contain oil and gas deposits" must be land "within the known geologic structure of a producing oil and gas field" (Atwood Br. 19) because "No one can know or believe that non-competitive or wildcat lands have oil and gas until a well has been drilled and oil sands found" (Atwood Br. 20). Since the land in question is "not within any known geologic structure of a producing oil and gas field," they assert that, having filed an application, they are entitled as a matter of right to a noncompetitive lease.

There is no substance in the factual assertion. Certainly one can believe in the existence of oil and gas deposits without drilling a well and finding oil. See the recent opinion of this Court in *Thor-Westcliffe Development, Inc.*

v. *Udall* (No. 17,101, decided January 24, 1963), where it is stated, "Experience in the administration of the Act has demonstrated that land subject to leasing after expiration or cancellation of a prior lease often has significant speculative value in spite of the fact that it is not actually 'within any known geological structure of a producing oil or gas field.'" Moreover, the whole of Section 17 will not admit of such an interpretation of the quoted phrases. Appellants' position would limit the Secretary's discretion to lease lands "within any known geologic structure of a producing oil and gas field." But the next sentence in Section 17, providing for competitive leasing of such land is introduced by the identical phrase "when the lands to be leased" as the provision in the last sentence for non-competitive leasing, and both provisions contain the mandatory "shall." Thus, after going full circle, we find that the Secretary really has no discretion in any field according to Atwood. The argument reveals its true premise—a denial of any discretion in the Secretary—without support and contrary to the clear decisions of this Court.

Appellants' reliance on the last sentence of Section 17 in an attempt to render nugatory the discretion conferred in the first sentence of that section is misplaced. The last sentence provides:

> When the lands to be leased are not within any known geological structure of a producing oil and gas field, the person first making application for the lease who is qualified to hold a lease under this Act shall be entitled to a lease of such lands without competitive bidding.

The very language discloses that the provision becomes applicable only after the Secretary has determined that the land is "to be leased." In the instant case, the Secretary has not determined to lease the land. On the contrary, he has determined not to lease it. Thus, the provision is irrelevant to this case and to consideration of the discretionary authority here involved, i.e., whether the land will be leased. The only function of the last provision of

Section 17 is to insure that, if the Secretary leases the land, he must lease it to the first qualified applicant and not someone else. The separate and distinct functions of the two provisions have been clearly delineated by this Court in *McKay* v. *Wahlenmaier*, 96 U.S.App. D.C. 313, 226 F.2d 35 (1955), and *Seaton* v. *Texas Company*, 103 U.S.App.D.C. 163, 256 F.2d 718 (1958), where, unlike here, the Secretary had determined to lease the land—in fact, he had leased it, but to the wrong person. In such cases, the dispute is fundamentally between two or more private parties and, even in such cases, the review of the Secretary's determination of the dispute is subject to a very limited review. *McKenna* v. *Seaton*, 104 U.S.App.D.C. 50, 259 F.2d 780 (1958), cert. den., 358 U.S. 835. The importance of this distinction concerning the real parties to the dispute was recognized by this Court in *Seaton* v. *Texas Company*, 103 U.S. App. D.C. at pp. 167-168:

> When the controversy is fundamentally between two private interests, * * * his discretion is not as great as when the controversy is between private interests on one hand and the Secretary "as guardian of the people," on the other * * *.

This has been recently reaffirmed in *Safarik* v. *Udall*, U.S. App. D.C. , 304 F.2d 944 (1962), cert. den., 371 U.S. 901.

Thus, it is plain that where, as here, an application is rejected because the Secretary in his discretion has decided not to lease the land at all, the second provision of Section 17 is irrelevant. For, in such a situation, "The Secretary has not determined that the lands * * * are 'to be leased' under the Mineral Leasing Act." *Haley* v. *Seaton*, 108 U.S. App. D.C. 257, 262, 281 F.2d 620, 625 (1960).

Appellants' assertion that the mere filing of an application for land, which the Secretary could lease before he determined not to lease it, creates a vested right in the applicant, is simply another way of saying the Secretary

has no discretion whether to lease. For it is plain that a mere offer to lease, and that is all an application is, can create no vested right against the United States in the offeror unless the Secretary has no discretion to determine whether to lease and, as we have shown, *supra*, pp. 6-8, this cannot be. Appellant Duesing would avoid this difficulty by attempting to picture the application as an acceptance of an offer by the Secretary. They find the alleged offer in the form of the 1955 version of 43 C.F.R. sec. 192.9 (Jt. App. 11). Such an assertion is patently unsound. Thus, the regulation relied on merely recites the words of the statute *"may be leased"* and by its own terms indicates that the Secretary had not yet determined to lease the land in question. In fact, by pointing out that certain land described was not to be leased, and that such land was the land *presently* in that category, there is a clear indication that some of the land which may be leased will not, in fact, be leased.

The whole history concerning the Kenai reserve negatives any intention of the Secretary to create rights to leases prior to settlement of the question of what areas should be reserved exclusively for wildlife purposes. It was perfectly reasonable, however, to accept applications so as to establish priorities as to the lands he should ultimately determine were "to be leased."

II

The Secretary's Determination Not to Lease the Land in Question Was Not Arbitrary or Capricious

As we have shown in Point I, *supra*, the Secretary of the Interior has been granted by statute the discretion whether to lease lands for oil and gas or not, and no duty is imposed on him until he has determined to lease them. This, he has not done. Consequently, there is no occasion to examine into the reasons why he has decided not to lease them. Nevertheless, a cursory examination of the record discloses that the decision was not lightly made. It was made only after discussions with other government

agencies, hearings at which interested parties presented their views, and notice that the question was being considered. A succinct discussion of these matters is contained in the Secretary's decision (Jt. App. 39-42) which, we submit, discloses beyond doubt that the decision was not arbitrary or capricious but in proper protection of all interests, including the Government.

III

Section 4 of the Administrative Procedure Act Is Inapplicable

Appellant Duesing alleges, or at least infers, that the closing of the southern half of the Moose Reserve to oil and gas leasing was rule making within the meaning of Section 4 of the Administrative Procedure Act, 5 U.S.C. sec. 1003(b), and that the notice of the closing did not comply with the requirements of that section. The short answer to this assertion is that "the notice requirements of section 4 of the Administrative Procedure Act contain an express exception when there is involved rule making relating to 'public property' • • •." *McNeil* v. *Seaton*, 108 U.S. App. D.C. 296, 301, 281 F.2d 931, 936 (1960). Obviously, the lands in question are public property. Moreover, notice was given and, in any event, as we have shown, the closing of the Moose Reserve was not "rule making," but, as the Secretary stated in his decision (Jt. App. 37), the "exercising in a formal manner his discretionary authority over issuing competitive leases under Section 17 of the Mineral Leasing Act." Moreover, until the Secretary determines to lease the lands, appellants have no right to leases of them. Thus, the alleged failure to follow Section 4 cannot operate to vest rights in appellants and the argument is therefore irrelevant.

IV

Withdrawal of Lands Is Not Here Involved

Appellant Atwood urges that closing the southern half of the Moose Reserve was a withdrawal and not made in compliance with the procedural requirements therefor (Atwood Br. 6-15). To support the contention, appellants point to the phrase "agreement * * * has been consummated" in the notice closing the area to oil and gas leasing and to the phrase "consummation of the withdrawal" in 43 C.F.R. sec. 192.9(e). Apparently by some semantic conversion the simple exercise by the Secretary of his discretion not to lease becomes a withdrawal. It is enough to say of this contention that Section 192.9(e) has no relevance at all. That section in clear terms advises that any pending applications for leases are suspended if they include lands which are within requests for withdrawals for wildlife purposes, and that after the withdrawal has been formalized and completed they will be considered in accordance with other provisions of 43 C.F.R. sec. 192.9. The requests for withdrawals referred to therein are requests, pending or future, leading to the creation of wildlife areas such as the Kenai Moose Reserve. The withdrawals creating the Moose Reserve, however, were completed in 1941 (Statement, *supra,* p. 2).

Moreover, as was pointed out in the Secretary's decision, he was not asserting any withdrawal power he might have (Jt. App. 37) and neither the notice of closing of July 24, 1958, nor the amended 43 C.F.R. sec. 192.9, is designated a public land order or couched in the familiar language of withdrawal, as would be the case with a withdrawal.

In short, the discussion of withdrawals is irrelevant and certainly has no bearing on the sole issue of the discretionary authority to lease land conferred on the Secretary of the Interior by Section 17 of the Mineral Leasing Act.

CONCLUSION

It is submitted that the judgments should be affirmed.

Respectfully,

RAMSEY CLARK,
Assistant Attorney General.

ROGER P. MARQUIS,
HERBERT PITTLE,
EDMUND B. CLARK,
Attorneys, Department of Justice,
Washington 25, D. C.

JANUARY 1963.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1963 674030 000

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

GEORGE HALL DOUGLASS GENE B. GRAHAM RUSSELL L. JAMERSON E. WILLARD MILLER, JR. E. H. RASMUSON MARK ROMANOFF ROBERT B. ATWOOD *Appellants,* vs. STEWART L. UDALL, Secretary, Department of the Interior, *Appellee.*	DOCKET No. 17,403 DOCKET No. 17,404 DOCKET No. 17,405 DOCKET No. 17,406 DOCKET No. 17,407 DOCKET No. 17,408 DOCKET No. 17,409

On Appeals from Judgments of the United States Court for the District of Columbia

Press of Byron S. Adams, Washington, D. C.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

GEORGE HALL DOUGLASS	DOCKET No. 17,403
GENE B. GRAHAM	DOCKET No. 17,404
RODNEY L. JOHNSTON	DOCKET No. 17,405
H. WILLARD NAGLEY, JR.	DOCKET No. 17,406
E. E. RASMUSON	DOCKET No. 17,407
MILAN RAYKOVICH	DOCKET No. 17,408
ROBERT B. ATWOOD	DOCKET No. 17,409
Appellants,	
VS.	
STEWART L. UDALL, Secretary, Department of the Interior,	
Appellee.	

On Appeals from Judgments of the United States Court for the District of Columbia

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JOINT APPENDIX

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1. Miscellaneous Docket

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

District Court Docket No. 293-62
U. C. Court Appeals Docket No. 17,409

ROBERT B. ATWOOD

v.

STEWART L. UDALL, Secretary, Department of the Interior

Action: Judicial Review and Appeal, Mandatory Injunction

Petitioner's Atty.: H. St. John Butler, Butler & McKinney.

Respondent's Atty.: Herbert Pittle, Department of Justice.

CIVIL DOCKET

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DATE	PROCEEDINGS
1962	Deposit for cost by
Jan. 26	Complaint, appearance Exhibits A thru H inclusive—filed.
Jan. 26	Summons, copies (3) and copies (3) of Complaint issued Ser 1/29/62. US Atty ser 1/29/62. Atty Gen ser 1/30/62.
Mar. 8	Motion of pltff. for production of documents, c/m 3-8-62, Exhibit "A", P&A; MC 3-8-62—filed.
Mar. 15	Motion of deft to dismiss or strike complaint and to suspend proceedings upon pltfs motion for production of documents; P&A; c/m 3/15/62; appearance of Herbert Pittle; MC 3/15/62—filed.

Mar. 20 Memorandum of P&A in support of defts motion to dismiss or strike and to suspend proceedings on pltfs motion for production; c/m 3/20/62—filed.

Apr. 24 Amended complaint; c/m 4/24/62—filed.

May 4 Motion of deft to dismiss; P&A; c/m 5/4/62; MC 5/4/62—filed.

May 7 Request of pltf for admission by deft; c/m 5/7/62 —filed.

May 10 Stipulation extending time for pltf to file opposition to defts motion to dismiss to and including 6/8/62—filed.

May 21 Stipulation extending time for deft to respond to motion for production and request for admissions to and including 6/15/62—filed.

Jun. 7 Opposition of pltf to motion to dismiss; exhibit "A"; c/m 6/7/62—filed.

June 18 Response of defendant to plaintiffs request for admissions; c/m 6-15-62—filed.

July 19 Notice by plaintiff to produce; c/m 7-19-62—filed.

July 19 Affidavits (9) in support of opposition to motion to dismiss; c/m 7-19-62—filed.

Aug. 2 Motion of Esther R. Brautigam, John N. Ferguson, Alexander S. Dunham, A. B. Hayes, Kenneth M. Johnston, Eleanor E. Lane, J. L. McCarrey, Jr. and Mrs. Cora B. McCarrey, N. Fred Nelson, Lloyd F. Smith, Mrs. Ralph T. Sweet, Executrix of the Estate of Ralph T. Sweet, deceased, and Alaska Moose Range Company for leave to intervene as parties plaintiff; c/m 8-1-62; Proposed complaint; points and authorities; appearance of Edwin R. Schneider, Jr. and Peaslee, Brigham, Albrecht and McMahon; Deposit by Schneider $5.00; M.C. 8-2-62—filed.

see next page

CIVIL DOCKET

UNITED STATES DISTRICT COURT OF THE DISTRICT OF COLUMBIA

Atwood vs. *Udall*

C. A. No. 293-62

Supplemental Page No. 1

DATE	PROCEEDINGS
1962	
Aug. 2	Order denying motion of Esther R. Brautigam, John N. Ferguson, Alexander S. Dunham, A. B. Hayes, Kenneth M. Johnston, Eleanor E. Lane, J. L. McCarrey, Jr., and Mrs. Cora B. McCarrey, N. Fred Nelson, Lloyd F. Smith, Mrs. Ralph T. Sweet, Executrix of Estate of Ralph T. Sweet, deceased, and Alaska Moose Range Company to intervene as parties plaintiff (N)—Tamm, J.
Aug. 7	Order dismissing amended complaint (N)—Tamm, J.
Aug. 17	Transcript of proceedings of 8-2-62; Vol. I; pages 1-53; (Rep. by Eva Marie Sanche, Court copy) —filed.
Sept. 27	Notice of appeal of applicants for intervention; deposit by Schneider $5.00 (copies mailed to H. St. John Butler and Herbert Pittle)—filed.
Oct. 1	Notice of appeal of plaintiff; deposit $5.00 by Butler (copy mailed to Herbert Pittle)—filed.
Oct. 1	Transcript of proceedings 8-2-62, Vol. I, pages 1-53 (Rep. by: E. M. Sanche, attorney's copy) —filed.
Oct. 3	Cost bond on appeal of plaintiff with United States Fidelity and Guaranty Company in sum of $250.00 approved—Fiat—Walsh, J.

Nov. 7 Record on Appeal delivered to United States Court of Appeals; deposit by Edwin R. Schneider $1.25.

Nov. 7 Receipt from United States Court of Appeals for original papers—filed.

District Court Docket Nos. 294-62 to 299-62, incl.
U. S. Court Appeals Docket Nos. 17,403 to 17,408, incl.

GEORGE HALL DOUGLASS, GENE B. GRAHAM, RODNEY L. JOHNSTON, H. WILLARD NAGLEY, JR., E. E. RASMUSEN, MILAN RAYKOVICH,

v.

STEWART L. UDALL, Secretary of the Interior.

[Note: Docket entries in all of above actions are identical as follows:]

CIVIL DOCKET

UNITED STATES DISTRICT FOR THE DISTRICT OF COLUMBIA

DATE	PROCEEDINGS
1962	Deposit for cost by
Jan. 26	Complaint, appearance Exhibits "A" thru "H" —filed.
Jan. 26	Summons, copies (3) and copies (3) of Complaint issued ser 1-29-62; US Atty ser 1-29-62 Atty Gen ser 1-30-62.
Mar. 19	Motion of deft to dismiss or strike complaint; P&A; c/m 3-19-62; Mc 3-19-62; appearance of Herbert Pittle—filed.
Mar. 22	Memorandum of P&A in opposition to deft's motion to dismiss or strike complaint; c/m 3-22-61 —filed.
Apr. 24	Amended complaint; c/m 4-24-62—filed.
May 4	Motion of deft to dismiss; P&A's; c/m 5-4-62; M.C. 5-4-62—filed.

May 7 Request by pltfs for admissions by deft; c/m 5-7-62—filed.

May 10 Stipulation extending time for pltff to oppose defts motion to dismiss to June 8, 1962—filed.

May 21 Stipulation extending time for deft to respond to pltffs request for admissions, until June 15, 1962—filed.

June 7 Memorandum of p&a's of pltff in opposition to deft's motion to dismiss; c/m 6-7-62—filed.

Jun 25 Stipulation adapting response to pltfs request for admissions filed in CA 293-62—filed.

Jul 19 Stipulation adopting affidavits, filed in CA 293-62 —filed.

Aug. 7 Order dismissing amended complaint (N)—Tamm, J.

Aug. 17 Transcript of proceedings of Aug. 2, 1962, Vol. I, pp. 1 to 53 (Rep. Eva M. Sanche) Court's copy ,filed in C.A. 293-62)—filed.

Oct. 1 Notice of appeal by pltf on order of 8/7/62. Deposit by Butler $5.00. Copy mail to Herbert Pittle—filed.

Oct. 4 Cost bond on appeal in sum of $250.00 with United States Fidelity & Guaranty approved (fiat)—Walsh, J.

2. Amended Complaints

(District Court Captions omitted)

(Filed 1-26-62)

District Court Docket No. 293-62

U. S. Court Appeals Docket No. 17,409

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action

No. 293-62

Amended Complaint

ROBERT B. ATWOOD, 820 - 4th Avenue P. O. Box 40, Anchorage, Alaska,

Plaintiff

vs.

STEWART L. UDALL, Secretary, Department of the Interior,

Defendant.

Complaint for Judicial Review and Appeal Against the Exercise of Unconstitutional Authority by the Secretary of the Interior, Without Statutory Authorization, in Violation of Satutory and Administrative Procedures for Notice and Hearings, Arbitrarily Without Due Process of Law, and for a Mandatory Injunction Requiring the Secretary to Reinstate the Plaintiff's Offer or Offers and Issue to the Plaintiff Oil and Gas Leases to Which He Is Entitled Under Law.

I.

1. This action is a complaint, petion for judicial review and appeal against a decision by the defendant, Secretary of the Interior, hereinafter called the Secretary, in the case of Richard K. Todd et al., A-28090, A-28311, A-28374, et al., decided October 30, 1961, and a mandatory injunction requiring the Secretary to reinstate the plaintiff's offer or offers to lease and issue to the plaintiff oil and gas leases

covering the lands hereinafter described by reference to the offer or offers for leases.

2. This action arises under Article IV, Section 3, Paragraph 2 of the Constitution; the fundamental requirements of due process; and the Mineral Leasing Act of February 25, 1920 (41 Stat. 437), as amended.

3. Jurisdiction is founded on the existence of a Federal question; the Administrative Procedure Act of 1946, 5 U.S.C., 1958 ed., sec. 1001 *et seq.*, 28 U.S.C. Sec. 1331, and Section 42 of the Mineral Leasing Act Revision of 1960 (74 Stat. 781). The amount in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars.

4. The plaintiff filed the following offer or offers to lease lands within the Kenai National Moose Range described in each offer, hereinafter referred to as the Moose Range, pursuant to that portion of Section 17 of the Minearl Leasing Act, as amended, which authorizes applications for leases of lands "not within any known geological structure of a producing oil or gas field":

> Anchorage Serial Nos. 029287, 029288, 029289, 029290, 029291, 029292, 029293 and 029294.

The offer or offers to lease were duly and regularly filed at the Anchorage, Alaska Land Office as indicated by the records, accompanied by the required filing fee and the first year's advance rental and were accepted, noted on the Land Office records, and assigned a serial number according the plaintiff priority over any other subsequent offer for the same lands, all in accordance with the law, rules and regulations of the Department of Interior then in effect. The plaintiff was the first applicant to make application for leases upon the lands covered by his offer or offers to lease, is a citizen of the United States and did not hold more than 100,000 acres in federal leases or pending offers in Alaska at the time the offers were filed.

Therefore, the plaintiff is qualified to hold leases under the provisions of the Mineral Leasing Act. Under the provisions of Section 17 of said Act, as amended, the Secretary is required by law, whenever an application or offer is made for the lease of lands "not within any known geological structure of a producing oil or gas field", to issue a lease to the first person making application thereof who is qualified to hold the lease under the Act. The offers were rejected in whole or in part under an agreement between the Bureau of Land Management and the United States Fish and Wildlife Service approved by the Secretary on July 24, 1958 (23 F.R. 5883). Said agreement provides in part:

> "Notice is hereby given that, pursuant to the regulation 43 CFR 192.9 (Circular 1990), agreement **** has been consumated between the Bureau of Land Management and the Fish and Wildlife Service of this Department, designating those lands within the Kenai National Moose Range on the Kenai Peninsula Alaska, *which are hereby closed to oil and gas leasing because such leasing would be incompatible with management thereof for wildlife purposes.*" (Emphasis added)

5. The Secretary's decision of October 30, 1961 affirmed the decision of the Director of the Bureau of Land Management, which affirmed the rejection by the Manager, Anchorage, Alaska Land Office, of the plaintiff's non-competitive offers to lease for oil and gas lands, or a part thereof, within the boundaries of the Moose Range for the reason that the lands applied for are within that portion of the Moose Range which the Secretary closed to oil and gas leasing on the ground that leasing would be incompatible with the management thereof for wildlife purposes.

6. The plaintiff alleges that the Congress has not delegated to the Secretary authority by statute to withdraw lands in the public domain from oil and gas leasing under Article IV, Section 3, paragraph 2 of the Constitution which provides that—

> "The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; ——— "

7. The Pickett Act of June 25, 1910, (36 Stat. 847) was enacted at the request of President Taft in a special message to Congress on September 27, 1909, creating the Teapot Dome, as a "temporary withdrawal in aid of proposed legislation affecting the use and disposition of petroleum deposits on the public domain". The Pickett Act provides:

> "The President may, at any time, in his discretion *temporarily* withdraw from *settlement, location, sale or entry* any of the public lands of the United States including the District of Alaska and reserve the same for waterpower sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress."

8. The House Committee Report on the Pickett Act (Report No. 983, 61st Congress) stated:

> "No statute has been found expressly conferring this authority (*id est,* to withdraw public lands), and the extent thereof has not been settled by the Supreme Court."

9. The plaintiff alleges that Section 32 of the Mineral Leasing Act provides "That the Secretary of the Interior is authorized to make necessary and proper rules and regulations to carry out the purposes of this Act. ——". The purposes of the Act are "An Act to promote the mining of coal, phosphate, oil, oil shale, gas and sodium on the public domain." Nowhere in the Act is there any broad authority to withdraw large areas of public lands from oil and gas leasing. Section 1 of the Act excludes certain lands giving rise to the doctrine "Expressio unius est exclusio alterius." The Act does not authorize the withdrawal of fish and wildlife lands from oil and gas leasing.

10. By a withdrawal order dated December 16, 1941, Executive Order No. 8979, 6 F.R. 6471, President Franklin D. Roosevelt withdrew the lands described in the plaintiff's offer or offers to lease as a part of the Moose Range. The order provides that "their reservation and use shall be without interference with the use and disposition thereof pursuant to the public lands laws applicable to Alaska". No restrictions against the issuance of oil and gas leases on the lands were included in such order. The Department of the Interior has issued oil and gas leases on lands within the boundaries of the Moose Range since the issuance of Executive Order No. 8979. The northern half of the Moose Range comprising approximately one million acres is open to leasing. The plaintiff alleges that this demonstrates the Department's conclusion that exploitation of such lands for oil and gas purposes was not prohibited by the terms of the Executive Order.

11. The plaintiff alleges that the finding in the agreement of July 24, 1958, that oil and gas leasing in Moose Range is incompatible with the management thereof for wildlife purposes is not supported by facts. Regulations are contained in 43 C.F.R. 192.9 (Circular 1945) governing oil and gas operations on wildlife refuge lands.

12. The plaintiff alleges that the closing of lands within the Moose Range under the agreement of July 24, 1958 was in fact a withdrawal of lands in the public domain from oil and gas leasing, for which there is no authority under the Mineral Leasing Act. Section 32 of the Mineral Leasing Act authorizes the Secretary to prescribe necessary and proper rules and regulations to do any and all things necessary to carry out the purposes of this Act, namely, "To promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain." The Act contains no authority for the Secretary to withdraw large areas of land in the public domain from leasing.

13. The plaintiff alleges that Senator Joseph C. O'Mahoney, then Chairman, Public Lands Subcommittee, United

States Senate, in a letter dated May 22, 1958 to Secretary of the Interior Fred A. Seaton questioned the authority of the Secretary to withdraw public domain lands for wildlife purposes. The letter enclosed a memorandum from Mr. Stewart French, Committee Counsel, which concluded as follows:

CONCLUSION

> "Neither the Mineral Leasing Act, cited in the regulations as their authority, nor the Acquired Lands, nor the Pickett Act, nor any other Act of Congress delegates to the Executive Branch general authority to withdraw, by administrative action alone, for wildlife purposes limitless areas of the public domain and suspend or modify Acts of Congress with respect to them."

Secretary Seaton in his reply to Senator O'Mahoney dated August 7, 1958 stated that "he had the necessary authority to withdraw lands for wildlife purposes". The plaintiff alleges that this shows that the closing of lands in the Moose Range under the agreement of July 24, 1958 was a withdrawal.

The Secretary in the decision of October 30, 1961 states that "to my knowledge he (the Secretary) has never asserted that he had authority under the Mineral Leasing Act to withdraw land from leasing." The plaintiff alleges that the closing of the lands in the Moose Range was in fact a withdrawal for which the Secretary has no authority.

14. The plaintiff alleges that the Secretary's regulations, 43 CFR 192.9 (Circular 1990) pertaining to leasing of wildlife refuge lands, range lands, and coordination lands contemplates the making of withdrawals. The word "withdrawal" is used in Sec. 192.9(a)(1) and (4) and again in Sec. 192.9(b)(4)(e) which provides as follows:

> "(e) *Lands in requested withdrawal.* All existing offers or applications for oil and gas leases covering lands included in requests for withdrawals for wildlife

> refuges, game ranges, coordination lands or Alaska wildlife areas, as defined herein, shall be suspended until after the *consummation of the withdrawal*, and thereafter such offers shall be considered in accordance with the provisions of this section." (Emphasis added).

The agreement of July 24, 1958 states that—

> "Notice is hereby given that, pursuant to regulation 43 CFR 192.9 (Circular 1990), agreement, as reflected by the map herein referred to, *has been consumated* . . . ." (Emphasis added).

Sec. 192.9 relates to withdrawals. The Secretary used the word "consumated" in the agreement of July 24, 1958 as the consummation of a withdrawal. The plaintiff alleges that the closing of lands in the Moose Range was a withdrawal and not the exercise of discretionary authority to issue oil and gas leases.

15. The plaintiff alleges that the procedures prescribed in 43 CFR 295.9 to 295.15 (Circular 1982) governing withdrawals of Federal lands provide for, (1) a notice of filing of an application for withdrawal of lands and of the opportunity of the public to object to, or comment on, the proposed withdrawal or reservation be duly published in the Federal Register, and (2) where appropriate, a public hearing be held. The adoption by the Secretary of an amended regulation 43 CFR 192.9 (Circular 1990), under the authority of Sec. 32 of the Mineral Leasing Act, and the approval of the agreement of July 24, 1958 between two subordinate agencies of the Department of the Interior in no way provides the minimal due process requirements set forth in 43 CFR 295.12 (Circular 1982).

16. Notices of proposed withdrawal of lands published in the Federal Registers of September 5, 1958, page 8440; September 9, 1958, page 6960; September 10, 1958, page 7006; September 28, 1958, page 7266; and September 25,

1958, page 7468, all provide for notice and hearing as follows:

> "For a period of sixty days from the date of publication of this notice, all persons who wish to submit comments, suggestions, or objections in connection with the proposed withdrawal may present their views in writing to the undersigned officer of the Bureau of Land Management, Department of the Interior, P.O. Box 1050, Fairbanks, Alaska.
>
> If circumstances warrant it, a public hearing will be held at a convenient time and place, which will be announced."

17. The plaintiff alleges that the policy of the Secretary to give notice and hold public hearings as provided for in the Administrative Procedure Act, is shown by a notice published in the Federal Register of October 31, 1958, page 8429, designating as a closed area under the Migratory Bird Treaty Act certain lands within the State of Arkansas, which provides as follows:

> "In accordance with section 4 of the Administrative Procedure Act (5 U.S.C. 1003), notice of intention to adopt this regulation dated August 11, 1958, was published August 15, 1958, in the Federal Register (23 F.R. 6309) and no protests or suggested changes having been received, this regulation is effective immediately upon publication in the Federal Register."

18. The plaintiff alleges that the policy of the Secretary to conform to the Administrative Procedure Act is shown by a notice published in the Federal Registers of September 11, 1958, page 7045, and November 5, 1958, page 8624, relating to the amendment of regulations pertaining to the Migratory Bird Conservation Act and Desert Land Entries, which provide as follows:

> "This proposed amendment relates to matters which are exempt from the rule making requirements of the Administrative Procedure Act (5 U.S.C. 1003); however, it is the policy of the Department of the Interior

that, wherever practicable, the rule making requirements be observed voluntarily. Accordingly, interested persons may submit, in triplicate, written comments, suggestions, or objections with respect to the proposed amendments to the Bureau of Indian Affairs, Washington 25, D.C., within thirty days of the date of publication of this notice in the Federal Register."

19. The plaintiff alleges that the intent of Congress to permit oil and gas operation in fish and wildlife areas is shown by Sec. 5 of the Act of July 3, 1958 (72 Stat. 322) provides for the leasing of oil and gas deposits in the lands beneath non-tidal navigable waters in the territory of Alaska, in part as follows:

"Sec. 5. * * * All operations under leases issued pursuant to this Act shall be subject to such rules and regulations as the Secretary of the Interior may prescribe for the prevention of injury to fish and game."

20. The plaintiff alleges that the State of Alaska has an interest in the issue of oil and gas leases in the Moose Range, since under Public Law 85-88 approved July 10, 1957 (71 Stat. 282) Alaska is entitled to 90% of the income from rentals and royalties from oil and gas leases and that the withdrawal of 1,070,000 acres of land in the Moose Range under the agreement of July 24, 1958 from oil and gas leasing will result in great loss of revenue to Alaska.

21. The plaintiff alleges that he has a vested right to the issuance of non-competitive leases under Section 17 of the Mineral Leasing Act, as amended, in accordance with the regulations in effect at the time they submitted their offers, 43 C.F.R. 192.9 (Circular 1945), which cannot be cut off by the issuance of an amended regulation 43 C.F.R. 192.9 (Circular 1990) and the agreement of July 24, 1958.

22. The plaintiff alleges that the closing or withdrawal by the defendant of over one million acres of land in the Kenai National Moose Range from oil and gas leasing is unnecessary, arbitrary and capricious, for the reason that

oil and gas exploration and development is compatible with the management of the Range for wildlife purposes.

23. The plaintiff alleges that the regulations contained in 43 C.F.R. 192.9 (Circular 1990) and the agreement of July 24, 1958 are inconsistent with the action of the Secretary in issuing oil and gas leases in the Moose Range prior to the issuance of such regulations and order and it was inequitable for the defendant to delay action on the plaintiff's offer or offers to lease for an unreasonable time pending the issuance of such regulations and order.

24. The plaintiff alleges that the clothing or withdrawal of lands in the Moose Range to oil and gas leasing is arbitrary, unreasonable and not in conformity with the long established policy of Congress favoring compatible multiple use of lands in the public domain as provided for in the Idaho Land Selection Act of 1913 (37 Stat. 687, 43 U.S.C. 860), the Agricultural Homestead Act (38 Stat. 509-510, 30 U.S.C. 121-124), the Stockraising Homestead Act (39 Stat. 862-865, 43 U.S.C. 291-301), and the Multiple Mineral Development Act of August 13, 1954 (68 Stat. 708, 30 U.S.C. 52-1531).

25. The plaintiff alleges that the Secretary in exercising his authority under the Mineral Leasing Act and fish and wildlife conservation laws, cannot ignore his responsibility to promote oil and gas exploration and production under the policy of mandatory oil import control program placed in effect by President Dwight D. Eisenhower under Presidential Proclamation No. 3279, which states that:

> "The new program is designed to insure a stable, healthy industry in the United States capable of exploring for and developing new hemisphere reserves to replace those being depleted. The basis of the new program, like that for the voluntary program, is the certified requirements of our national security which make it necessary that we preserve to the greatest extent possible a vigorous, healthy petroleum industry in the United States.

"In addition to serving our own direct security interests, the new program will also help prevent severe dislocation in our own country as well as in oil industries elsewhere which also have an important bearing on our own security. Petroleum, wherever it may be produced in the free world, is important to the security, not only of ourselves, but also of the free people of the world everywhere."

26. The plaintiff has exhausted his administrative remedy against the defendant, Secretary of the Interior, since no further appeal can be taken against the decision of the Secretary in the case of Richard K. Todd, et al., under the provisions of 43 CFR 221.

WHEREFORE, the plaintiff prays:

1. That this Honorable Court adjudge and decree that under Article IV, Section 3, Paragraph 2 of the Constitution of the United States, the power to dispose of and make all needful rules and regulations respecting the territory of the United States is vested in the Congress and that the Congress cannot delegate unfettered discretion to the Secretary of the Interior to make such rules and regulations without declaring a policy and establishing a standard for the exercise of the delegated authority.

2. That the Pickett Act of June 25, 1910, as amended, only authorized the President to temporarily withdraw public lands from settlement, location, sale, or entry and does not authorize the Secretary of the Interior to close or withdraw lands from oil and gas leasing under the Mineral Leasing Act of 1920, as amended, for fish and wildlife purposes, thereby destroying valuable property priority rights of the plaintiff to an oil or gas lease or leases.

3. That Executive Order No. 8979 of December 16, 1941 establishing the Kenai National Moose Range, makes no provision for the withdrawal of any of the lands from oil and gas leasing or in aid of petroleum conservation and therefore does not authorize the Secretary of the Interior

to close or withdraw lands in the Moose Range from oil and gas leasing under the Mineral Leasing Act of 1920, as amended.

4. That the Mineral Leasing Act of 1920, as amended, does not delegate any authority to the Secretary of the Interior to close or withdraw lands in the public domain from oil and gas leasing, but only under Section 32 of the Act to prescribe necessary and proper rules and regulations to carry out the purposes of the Act, namely to promote the development of oil and gas on the public domain by oil and gas leasing.

5. That the agreement of July 24, 1958 closing lands in the Kenai National Moose Range from oil and gas leasing was in fact a withdrawal of the lands, nothwithstanding the allegation by the Secretary of the Interior that he was simply exercising his discretionary authority to issue oil and gas leases.

6. That the action of the Secretary of the Interior in closing lands in the Kenai National Moose Range from oil and gas leasing was arbitrary, capricious and not in accordance with law or the minimal requirements of due process, since no notice was given or hearings held to afford interested parties having vested priority rights to oil and gas leases an opportunity to be heard and demonstrate that oil and gas leasing would not be incompatible with the management of the Moose Range for wildlife purposes.

7. The action of the Secretary of the Interior in closing or withdrawing lands in the Kenai National Moose Range from oil and gas leasing without notice and hearings was in violation with the Secretary of the Interior's own regulations contained in 43 CFR 295.9 to 295.15 (Circular 1982) and the long established policy of the Department of the Interior to give notice and hold hearings in accordance with the intent of Congress under the Administrative Procedure Act.

8. That the amended regulation 43 CFR 192.9 (Circular 1990) issued under the authority of Sec. 32 of the Mineral Leasing Act of 1920, as amended, and the agreement of July 24, 1958 closing or withdrawing lands in the Kenai National Moose Range from oil and gas leasing are null and void for the reason that they are in violation of Article IV, Section 3, Paragraph 2 of the Constitution and not authorized by the Mineral Leasing Act of 1920, as amended.

9. That the leasing of oil and gas on lands in the Kenai National Moose Range is not incompatible with the management of the Moose Range for wildlife purposes as held by the Secretary of the Interior in the agreement of July 24, 1958.

10. That in closing or withdrawing lands in the Kenai National Moose Range from oil and gas leasing, the Secretary of the Interior should not ignore his responsibility to promote oil and gas exploration and production in the interest of national security under Presidential Proclamation No. 3279, establishing the Mandatory Oil Import Control Program.

11. That under Section 17 of the Mineral Leasing Act of 1920, as amended, the plaintiff has a vested right and is entitled to the issuance of a non-competitive oil and gas lease or leases on the lands not within any known geological structure of a producing oil or gas field covered by his offer or offers for lease.

12. That a mandatory injunction be issued restraining the Secretary of the Interior from implementing the provisions of the Department of the Interior Regulations 43 CFR 192.9 (Circular 1990) relating to Alaska wildlife areas and the agreement approved by the Secretary on July 24, 1958 closing or withdrawing lands in the Kenai National Moose Range from oil and gas leasing and to reinstate the offer or offers to lease of the plaintiff.

14. That this Honorable Court grant to the plaintiff such other and further relief as it may consider appropriate.

Respectfully,

H. St. John Butler
Attorney for the Plaintiff
Butler & McKinney
1730 K Street, N. W.
Washington 6, D. C.
965-1085

[Note: Complaints in other actions are identical with District Docket Nos. 293-62 and U. S. Court of Appeals Docket No. 17,409, except paragraph 4 which is as follows in each action]

District Court Docket No. 294-62
U. S. Court Appeals Docket No. 17,403
Anchorage Serial Nos. 028606 and 029610

District Court Docket No. 295-62
U. S. Court Appeals Docket No. 17,404
Anchorage Serial Nos. 028594, 028597, 028598 and 028599

District Court Docket No. 296-62
U. S. Court Appeals Docket No. 17,405
Anchorage Serial Nos. 029295, 029296, 029297, 029298, 029299 and 029300

District Court Docket No. 297-62
U. S. Court Appeals Docket No. 17,406
Anchorage Serial Nos. 029147, 029247 and 029248

District Court Docket No. 298-62
U. S. Court Appeals Docket No. 17,407
Anchorage Serial No. 029180

District Court Docket No. 299-62
U. S. Court Appeals Docket No. 17,408
Anchorage Serial Nos. 029250, 029251, 029254 and 029255

3. Defendant's Motion to Dismiss for Failure to State a Claim

(District Court Captions omitted)

Filed 5/4/62)

District Court Docket Nos. 293-62 to 299-62, incl.

Defendant's Motion to Dismiss for Failure to State a Claim

The defendant moves the Court to dismiss this action because the complaint fails to state a claim against the defendant upon which relief can be granted.

The reason why the complaint fails to state a claim against the defendant upon which relief can be granted is set forth in detail in the memorandum of points and authorities filed in support of this motion.

HERBERT PITTLE
Attorney for Defendant
Room 2136, Department of Justice
Republic 7-8200, ext. 2712

4. Plaintiff's Request for Admissions

(District Court Captions omitted)

(Filed 5/7/62)

District Court Docket Nos. 293-62 to 299-62, incl.

Plaintiff's Request for Admissions by Defendant

Now comes the plaintiff and requests under Rule 36 of the Federal Rules of Civil Procedure that the defendant within ten days after service of this request to make the following admissions of fact for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial.

1. That the Kenai National Moose Range on the Kenai Peninsula, Alaska, which was established by Presidential Executive Order on December 16, 1941 aggregates 2,000,000 acres.

2. That a portion of the Moose Range aggregating approximately 1,422,860 acres lies within the Kenai tertiary basin which has, by an oil discovery therein, been shown to be a new oil province.

3. That a total moose population in Alaska is estimated at approximately 40,000; 9,500 of which are at large and scattered, the balance of the herd is located geographically as follows:

4,000	Kenai Moose Range
1,500	in Kenai outside the reserve
10,000	Susitna Area in the agricultural area of Alaska
5,000	Upper Copper River Basin
5,000	Tanana and Yukon
5,000	Seward Peninsula
30,500	

4. That in the Moose Range there is an average of approximately one moose for each five hundred acres.

5. That although the Kenai Moose Range is the only area in Alaska designated by the Federal Government as a moose range, the moose have found other areas more attractive to them and are more numerous in areas that are populated and developed by roads, farms, houses, schools and facilities of civilization.

6. That the best forage for moose is young trees and where lands have been cleard in the Moose Range for access roads from Sterling Highway to wellsites, moose feed on the fallen trees and as young trees sprout in the cleared area, moose continue to feed in that area.

7. That assuming that the portion of the Kenai tertiary basin within the Kenai Peninsula might in the future prove as productive of oil and gas as the great productive area of the San Joaquin Valley in California, an estimate of the possible future use of the surface area of the Kenai Moose Range for oil and gas production can be obtained.

8. That assuming that a portion of the Kenai tertiary basin within the Kenai Peninsula aggregating 1,442,860 acres should prove productive to the same extent as the San Joaquin Valley in California, then approximately 86,866 acres or approximately 6% of the surface area of the Moose Range might possibly be expected to be underlain by oil and gas productive strata.

9. That modern oil development techniques indicate that the full development of such an area of approximately 86,866 acres would involve the following:

(1) Clearing of trees along the access roads for a width of approximately 40 feet on each side of the road, and a clearing of trees in an area of 330′ x 330′ at the drillsite.

(2) With a development program consisting of one well for each 160 acres of the approximately 86,866 acres within the Moose Range which might possibly be found productive, this would make a total of 542 wells which might be drilled. This would mean 32 acres in each section that included wellsites and roads might be expected to be cleared of trees. There are 135.7 sections 10 640 acres in the approximately 86,866 acres, so that 4,344.36 acres of the Moose Range might be expected eventually to be clear of mature trees under a full development program. This would constitute .301% of that portion of the Moose Range within the tertiary basin.

10. That after the roadways and drillsites have been cleared and drilling has taken place, only two 20-foot roads in each square mile of the approximately 86,866 acres where oil structures might be expected to be found would be maintained and used and that the drillsite only a production site 30′ x 100′ would be maintained and used for production purposes and that each producing wellsite would consist of a small shed or structure covering the pipes and valves within the clearance of 30′ x 100′.

11. That assuming that one well for each 160 acres might permanently be used for production purposes, only 5.15 acres per section would be required. Since there are 135.7 sections in the approximately 86,866 possibly productive acres within the Moose Range, only 699 acres out of the 1,422,860 acres of the Moose Range within the tertiary basin could possibly be expected to be used for production purposes.

12. That the permanent use of 699 acres out of the approximately 1,422,860 acres of the Moose Range within the tertiary basin would mean that 0.048%, i.e., or less than ½ of 1%, of the surface area of the Moose Range might possibly in the future be utilized for oil and gas production.

13. That of the 4,344.36 acres of the Moose Range that might be expected to be cleared in the future during drilling operations, only 699 acres would be used during the life of production, thus allowing the remaining 3,644.36 acres of the cleared area to grow back with young trees and thus become the best spots within the Moose Range for moose forage when the young trees have sprouted.

14. That the present practice of the Fish and Wildlife Service is to send crews of men into the Moose Range reserve to cut down the mature trees for moose fodder and to permit young trees to grow and provide moose forage.

15. That in Circular No. 17 entitled "Alaska's Fish and Wildlife", published by the Fish and Wildlife Service, it is stated on Page 23:

> "*Scrub growth of willow,* birch and aspen *provides the winter range essential to large moose herds.* In a day, 1 moose will eat 40 to 50 pounds of this browse. Unchecked, a moose herd can increase beyond the capacity of the winter forage plants to support it. *This results in deterioration of the range and subsequent starvation in the herd during severe winters.*"

16. That the defendant on July 24, 1958 closed the southern half of the Moose Range to oil and gas leasing because such activities would be incompatible with the management thereof for wildlife purposes 16 years, 7 months, and 8 days after the Range was established by Presidential Executive Order.

17. That in the defendant's motion to dismiss for failure to state a claim in the case of *Bert F. Duesing* vs. *Stewart L. Udall, Secretary of the Interior,* Civil Action No. 290-62, filed April 18, 1962, the defendant stated that "closing a part of the Kenai National Moose Range to oil and gas leasing, *technically did not constitute a withdrawal of public lands* from oil and gas leasing but represented merely

the exercise of the discretionary authority of the Secretary to refuse to issue non-competitive leases under Sec. 17 of the Mineral Leasing Act."

18. That the *defendant's action in continuing* to keep the *northern half* of the Moose Range *open* to oil and gas leasing *clearly indicates that oil and gas leasing is compatible* with the management of the Moose Range for wildlife purposes.

19. That on April 30, 1962 the defendant, Secretary of the Interior, made an address before the Independent Petroleum Association of America in Kansas City, Missouri, in which he said as follows:

> "Intelligent cooperation with wildlife experts on Alaska's Kenai Moose Range in connection with the discovery of petroleum in that region resulted in improvement of the habitat of the moose."

20. That as a matter of fact oil and gas leasing in the entire Kenai National Moose Range, including the southern portion thereof which was closed to leasing under the agreement of July 24, 1958 is compatible with the management of the Moose Range for wildlife purposes.

Respectfully,

H. St. John Butler
Attorney for the Plaintiff
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Washington 6, D. C.
965-1085

5. Defendant's Answers to Requests for Admission

(District Court Captions omitted)

(Filed 6/15/62)

District Court Docket Nos. 293-62 to 299-62, incl.

Defendant's Response to Plaintiff's Request for Admissions

Now comes the defendant and in response to the plaintiff's request for admissions of fact makes the following response to the similarly numbered paragraphs of plaintiff's request:

1. Admit.

2. Admit.

3. Admit the total moose population and the numbers in Kenai; no record as to the last four items.

4. Admit; however, not all of the moose range is inhabitable by moose since part of it consits of a glacier, an icefield and elevated areas not suitable for moose.

5. Admit.

6. Admit.

7. The assertion is based upon assumption and conjecture and therefore does not propose a fact to be admitted or denied.

8. The assertion is based upon assumption and conjecture and therefore does not propose a fact to be admitted or denied.

9. The assertion is based upon assumption and conjecture and therefore does not propose a fact to be admitted or denied.

10. The assertion is based upon assumption and conjecture and therefore does not propose a fact to be admitted or denied.

11. The assertion is based upon assumption and conjecture and therefore does not propose a fact to be admitted or denied.

12. The assertion is based upon assumption and conjecture and therefore does not propose a fact to be admitted or denied.

13. The assertion is based upon assumption and conjecture and therefore does not propose a fact to be admitted or denied.

14. Admit that this practice is followed to some extent in some areas; the moose feed on the successive growth of new species of trees, not on the cut spruce which is the climax forest.

15. Admit.

16. Admit; however, there was no interest in oil and gas leasing in the moose range until the early 1950's and oil and gas leasing in the moose range was suspended from August 31, 1953, until July 24, 1958, except for the period from December 20, 1955, to February 6, 1956.

17. Admit.

18. Deny; it indicates only that oil and gas leasing is compatible with the management of the moose range for wildlife purposes only in the northern half of the range.

19. Admit.

20. Deny.

JOHN A. CARVER, JR.,
Assistant Secretary of the Interior.

Sworn to and subscribed before me this 15th day of June 1962.

HUGO DUHN
Notary Public in and for the
District of Columbia
My commission expires May 14, 1967

6. Secretary of the Interior Decision of October 30, 1962 in the Case of Richard K. Todd, et al. (68 I.D. 291)

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON 25, D. C.

Anchorage 026746, etc, Anchorage 040636,
Anchorage 028099

Noncompetitive offers to lease for oil and gas rejected
Affirmed

A-2809—RICHARD K. TODD, *et al.*
A-28311—ESTHER R. BRAUTIGAM
A-28374—M. B. KIRKPATRICK

APPEALS FROM THE BUREAU OF LAND MANAGEMENT

Richard K. Todd and others [1] have appealed to the Secretary of the Interior from several decisions dated March 25, 1959, October 22, 1959, or December 29, 1959, respectively, of the Director or the Acting Director of the Bureau of Land Management which affirmed the rejection by the manager of the Anchorage land office of their respective non-competitive offers to lease for oil and gas certain lands within the boundaries of the Kenai National Moose Range on the Kenai Peninsula in Alaska because the lands applied for are within the portion of the moose range which the Secretary has decided to close to oil and gas leasing. The offers were filed pursuant to section 17 of the Mineral Leasing Act, as amended (30 U. S. C., 1958 ed., sec. 226). The Acting Director held that the determination of whether to issue a lease for oil and gas lies within the discretion of the Secretary and that, if the Secretary determines in his discretion not to lease certain land, offers to lease such land must be rejected.

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[1] See Appendix for the names of the appellants and the serial numbers of their offers.

The Kenai National Moose Range was established by Executive Order 8979, dated December 16, 1941 (6 F. R. 6471), which provided in pertinent part:

> "By virtue of the authority vested in me as President of the United States, it is ordered that, for the purpose of protecting the natural breeding and feeding range of the giant kenai moose on the Kenai Peninsula, Alaska, which in this area presents a unique wildlife feature and an unusual opportunity for the study in its natural environment of the practical management of a big game species that has considerable local economic value, all of the hereinafter-described areas of land and water of the United States lying on the northwest portion of the said Kenai Peninsula, be, and they are hereby, subject to valid existing rights, withdrawn and reserved for the use of the Department of the Interior and the Alaska Game Commission as a refuge and breeding ground for moose for carrying out the purposes of the Alaska Game Law of January 13, 1925, 43 Stat. 739, U. S. C., title 48, secs. 192-211, as amended:
>
> "* * * * * * *

The order went on to state that except for a small strip of land not material here none of the land described "shall be subject to settlement, location, sale or entry, or other disposition", that the General Land Office (now Bureau of Land Management) retained primary jurisdiction over the lands, and that the order did not "prohibit the hunting or taking of moose and other game animals and game birds * * *."

The moose range lies south of Anchorage and encompasses an area of approximately 2,000,000 acres in a roughly rectangular shape extending up to 125 miles from north to south and up to 70 miles from east to west.

In the most recent revision of the departmental regulation relating to oil and gas leasing of wildlife refuge and game range lands (43 CFR, 1959 Supp., 192.9), the Department, for purpose of controlling the issuance of oil

and gas leases, divided the public lands withdrawn for wildlife purposes into four classes. One of these is "Alaska wildlife areas", which are defined as "areas in Alaska created by a withdrawal of public lands for the management of natural wildlife resources and administered by the United States Fish and Wildlife Service" (*id.*, 192.9(a)(4)). The moose range falls into this class. The regulation further provides that

> "As to game range lands and Alaska wildlife areas, representatives of the appropriate office of the Bureau of Land Management and the United States Fish and Wildlife Service will confer for the purpose of entering into an agreement specifying those lands which shall not be subject to oil and gas leasing. * * *" *Id.*, 192.9(b)(3).

On July 24, 1958, the Secretary signed an agreement[2] reached by these agencies which, roughly, opened the northern half of the range and closed the southern half to oil and gas leasing "because such activities would be incompatible with management thereof for wildlife purposes."

The manager and Acting Director based their decisions upon this directive and indeed, if it is valid, the offers must be rejected. In their appeals the several appellants attack it on a variety of grounds.

On ground common to almost all the appeals is the contention that the Secretary has no discretion in determining whether to lease public lands not withdrawn from leasing by the Mineral Leasing Act, as amended, but that he is under a mandatory duty to issue a lease to the first person filing a proper application who is qualified to hold a lease under the act. Stated conversely, the contention is that upon the filing of their offers the appellants acquired a vested right to have leases issued to them, since the lands applied for were then open to leasing, and they could not

[2] Published in the Federal Register on August 2, 1958 (23 F. R. 5883).

be deprived of this right by any subsequent action of the Secretary, to wit, the adoption of the July 24, 1958, agreement. (The appellants' offers were all filed prior to that date.)

In the recent case of *Haley* v. *Seaton*, 281 F. 2d 620 (D. C. Cir. 1960), in which the identical argument was raised, the court rejected it, holding:

> "We are of the opinion, for reasons that we shall presently undertake to state, that the Secretary of the Interior had discretion to accept or reject Haley's applications for leases. If that conclusion is sound, then it must necessarily follow that the mere applications for leases created no vested rights in Haley.
>
> "As originally enacted, the Mineral Leasing Act of 1920 (§ 17) provided for leases only on 'deposits of oil or gas situated within the known geologic structure of a producing oil or gas field * * *.'" However, § 13 of that Act authorized the Secretary of the Interior to issue an exclusive prospecting permit on land not within any known geological structure.
>
> "Section 13 of the Mineral Leasing Act was amended by the Act of August 21, 1935, 49 Stat. 674, to provide:
>
> > "'That the Secretary of the Interior is hereby authorized, and directed, under such necessary and proper rules and regulations as he may prescribe, to grant to any applicant qualified under this Act a prospecting permit, * * * *Provided,* That said application was filed ninety days prior to the effective date of this amendatory Act. * * * *Provided further,* That any application for any prospecting permit filed after ninety days prior to the effective date of this amendatory Act shall be considered as an application for lease under section 17 hereof: * * *.'
>
> "Section 17 of the Mineral Leasing Act provided 'that all unappropriated deposits of oil or gas situated within the known geologic structure of a producing oil or gas field and the unentered lands containing the same * * * *may be leased* by the Secretary of the Interior * * *.' (Emphasis ours.)

"The Act of August 21, 1935, also amended § 17 of the Mineral Leasing Act to read, so far as here pertinent, as follows:

> " 'Sec. 17. All lands subject to disposition under this Act which are known or believed to contain oil or gas deposits, except as herein otherwise provided, *may be leased by the Secretary of the Interior* after the effective date of this amendatory Act, to highest responsible qualified bidder by competitive bidding under general regulations. * * * *Provided further,* That the person first making application for the lease of any lands not within any known geologic structure of a producing oil or gas field who is qualified to hold a lease under this Act, including applicants for permits whose applications were filed ninety days prior to the effective date of this amendatory Act shall be entitled to a preference right over others to a lease of such lands without competitive bidding * * *.' (Emphasis ours.)

"Section 17 of the Mineral Leasing Act was again amended by the Act of August 8, 1946, 60 Stat. 950, to read, so far as here pertinent, as follows:

> " 'Sec. 17. All lands subject to disposition under this Act which are known or believed to contain oil or gas deposits *may be leased by the Secretary of the Interior.* When the lands to be leased are within any known geological structure of a producing oil or gas field, they shall be leased to the highest responsible qualified bidder by competitive bidding under general regulations, * * *. When the lands to be leased are not within any known geological structure of a producing oil or gas field, the person first making application for the lease who is qualified to hold a lease under this Act shall be entitled to a lease of such lands without competitive bidding. * * *' (Emphasis ours.)

"It is significant that the phrase 'may be leased by the Secretary of the Interior' in § 17 of the original Mineral Leasing Act was carried forward without change in the Amendment of 1935 and the Amendment of 1946, indicating an intent to continue to give the

Secretary of the Interior discretionary power, rather than a positive mandate to lease.

"It was authoritatively settled that an application for a prospecting permit under § 13, supra, as originally enacted, created no vested right in the application.[10]

"The court, in United States ex rel. McLennan v. Wilbur, 283 U. S. 414, 418, 419, 51 S. Ct. 502, 504, 75 L. Ed. 1148, held that the provisions of the Mineral Leasing Act plainly indicated 'that Congress held in mind the distinction between a positive mandate to the Secretary and permission to take certain action in his discretion. Also, the difference between applicants for mere privileges and those persons who, because of expenditures, or otherwise, deserved special consideration' and ' "that under the Act, [1920] the granting of a prospecting permit for oil and gas is discretionary with the Secretary of the Interior and any application may be granted or denied, * * *." '

"Prior to the amendment of § 17 by the Act of August 8, 1946, this court had held that the Secretary of the Interior had discretionary power to accept or reject an application for a noncompetitive oil and gas lease under § 17.[11]

"This court, in United States ex rel. Jordan v. Ickes, 79 App. D. C. 114, 143 F. 2d 152, certiorari denied 320 U. S. 801, 64 S. Ct. 432, 88 L. Ed. 484; 323 U. S. 759, 65 S. Ct. 93, 89 L. Ed. 608, held that it was not the intent of Congress by the amendatory Act of August 21, 1935, to deprive the Secretary of the Interior of such discretion accorded him under the original Act, except as to a very limited group of applications filed 90 days prior to the effective date of the amendment.

"[10] Wilbur v. United States, 60 App. D. C. 11, 46 F. 2d 217, affirmed United States, ex rel. McLennan v. Wilbur, 283 U. S. 414, 415, 51 S. Ct. 502, 75 L. Ed. 1148.

"[11] Wann v. Ickes, 67 App. D. C. 291, 92 F. 2d 215, 217; United States ex rel. Roughton v. Ickes, 69 App. D. C. 324, 101 F. 2d 248, 251; Dunn v. Ickes, 72 App. D. C. 325, 115 F. 2d 36, 37, certiorari denied 311 U. S. 698, 61 S. Ct. 137, 85 L. Ed. 452.

> "We are of the opinion that the 1946 amendment in nowise limited such power in the Secretary of the Interior and continued his discretionary power either to grant or reject applications for leases. As observed above, the phrase in § 17 of the Mineral Leasing Act of 1920, as originally enacted, reading 'may be leased by the Secretary of the Interior' was not changed by the Amendment of August 8, 1946. It was carried into the amendatory Act. The provision for the leasing of lands within a known geological structure and lands not within any known geological structure applies only to lands 'to be leased,' plainly implying that the Secretary of the Interior was to determine what lands were to be leased. Accordingly, we conclude that the acceptance or rejection of the applications to lease here involved was a matter resting within the discretion of the Secretary of the Interior." (Pp. 624-25.)

Therefore, I conclude that the 1946 amendment to section 17 of the Mineral Leasing Act did not deprive the Secretary of his discretionary authority over the issuance of oil and gas leases under the Mineral Leasing Act, as amended.

In one form or another, most of the appellants contend that the Secretary lacks authority to withdraw from mineral leasing large areas of public lands. They assert, as a subsidiary to this argument, that in withdrawing part of the moose range from leasing the Secretary did not follow the procedure prescribed in his regulations for making withdrawals.

The short answer to these assertions is that neither in the agreement of July 24, 1958, *supra,* nor in the regulation pursuant to which the agreement was adopted did the Secretary purport to exercise his authority to withdraw land. Although the Secretary possesses and has long exercised broad authority to withdraw public lands, he felt it desirable a number of years ago to formalize his authority by an express delegation from the President. Solicitor's opinion, 57 I. D. 331 (1941). Executive orders

of delegation were issued, the latest being Executive Order No. 10355 of May 26, 1952 (17 F. R. 4831). Section 1 of this order specifies that all orders issued by the Secretary under authority of the order "shall be designated as public land orders." In accordance with this requirement orders of withdrawal issued by the Secretary have been designated and numbered as public land orders. See Appendix B to Chapter 1 of 43 CFR, 1954 ed., and 43 CFR, 1959 Supp. Neither the agreement of July 24, 1958, nor 43 CFR, 1959 Supp., 192.9 is designated as a public land order or recites as authority Executive Order No. 10355. Consequently it is plain that the Secretary did not purport to withdraw land under the authority of that order.

Aside from Executive Order No. 10355 the Secretary has only limited statutory authority to withdraw public lands, e. g., 43 U. S. C., 1958 ed., sec. 300 (stock-driveway withdrawals), and 43 U. S. C., 1958 ed., sec. 416 (reclamation withdrawals). To my knowledge he has never asserted that he had authority under the Mineral Leasing Act to withdraw land from leasing.

Finally, neither the agreement of July 24, 1958, nor the regulation is couched in the familiar language of withdrawal, language that is used again and again in public land orders and other statutory withdrawals. Certainly the Secretary would not have eschewed the use of such familiar language had he intended to make a withdrawal.

In adopting the agreement of July 24, 1958, the Secretary was simply exercising in a formal manner his discretionary authority over issuing noncompetitive leases under section 17 of the Mineral Leasing Act. Because the effect upon oil and gas applicants of the exercise of this authority is the same as a withdrawal of land, the appellants have confused the two authorities together. But the source of authority does not change because of its effect. Stripped of all authority to withdraw lands, the Secretary would still have his discretionary authority to refuse to issue

leases where he thinks issuance would not be in the public interest.

The formal exercise by the Secretary of his discretionary authority is nothing new in the administration of the Mineral Leasing Act. Thus, on February 6, 1939, the Acting Secretary, for the purpose of protecting and conserving potash deposits, orders that "until further notice, no lease under the oil and gas provisions of * * * [the Mineral Leasing Act] will be issued for the following-described lands [in New Mexico], and no application for oil and gas lease will be accepted, nor will any rights be acquired by the filing of an application therefor * * *" (4 F. R. 1012). Again, in a memorandum dated April 18, 1942, to the Commissioner of the General Land Office, the Department adopted the policy of not issuing oil and gas leases in the Ivanpah Valley, California. See *Marie E. Tuttle et al.*, A-27481 (January 28, 1958). And, on January 27, 1953, the Department issued Order No. 2714 (18 F. R. 700) declaring that "until further notice, no oil and gas lease under the Mineral Leasing Act * * *, shall be issued" for described wild areas in the Los Padres National Forest, California, and the Santa Fe National Forest, New Mexico. The area comprised wilderness areas. See *Cecil H. Phillips et al.*, fn. 3, *supra*. These formal actions did not purport to be and did not constitute withdrawals of land. They were merely formalized exercises of discretion, just as the agreement of July 24, 1958, is.

Another argument offered by appellants is that the Secretary must issue them leases because at the date their offers were filed the lands applied for were open to oil and gas leasing under the pertinent statute and regulation. The facts are undisputed. The Mineral Leasing Act does not prohibit leasing within a moose range. The pertinent regulation, until its amendment in January 1958, permitted oil and gas leasing of land in wildlife refuges under certain conditions (43 CFR, 1954 ed., sec. 192.9) and

would not necessarily have prevented the issuance of leases to appellants.

This is merely another facet of the contention that an applicant for an oil and gas lease acquires some right to a lease merely by filing his application. The contention has already been answered, but it may be observed here that the effect of the contention would be that once an application has been filed for land open to leasing the Secretary loses his discretion to determine whether a lease should be issued. He could only exercise his discretion prior to the filing of an application. With the thousands of acres of public land open to leasing, the appellants are asking the Secretary to do the impossible, i. e., make a determination in advance whether any land should not be leased. Not only would this cast an enormous initial burden upon the Secretary but it would freeze a determination by him once an application is filed, preventing him from changing a determination on the basis of changing circumstances occurring after the filing of an application. Indeed, even if circumstances had changed prior to the filing of the application but a final determination of policy or the formalizing of a final determination had not been made prior to the filing, the hands of the Secretary would be tied. Such a conclusion has no support in law or in reason.[3]

Some of the appellants raise the claim of equities, that it is unfair to reject applications on the basis of a determination made 4 years after the applications were filed. In *Dunn* v. *Ickes, supra,* the plaintiff asked the court to order the Secretary to act on his application. Refusing to do so, the court said: "It cannot be doubted that under many circumstances withholding action on such applications for a rather extended period would be eminently proper, if not essential to wise administration." 115 F. 2d, at p. 37.

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[3] In Order No. 2714, *supra*, the Department specifically directed that "All pending applications for such leases * * * shall be rejected." This is the same type of action that is being complained of here.

At all times material here, except for one brief period, the processing of oil and gas offers for lands in the Kenai moose range was suspended, pending revision of the regulations. The first of the offers under consideration was filed on May 21, 1954. Almost 9 months before, the Bureau of Land Management, by a memorandum dated August 31, 1953, ordered the suspension of action on all oil and gas offers within a fish and wildlife refuge until further notice pending a study of the policy and regulations relating to the issuance of leases in wildlife refuges.

On December 6, 1955, the Department amended the oil and gas regulation, 43 CFR 192.9 (20 F. R. 9009; Circular 1945), to close certain areas to leasing, make some available for leasing under restrictions, and open others to unrestricted leasing. It appears that the Bureau considered that the approval and publication of the amended regulations automatically vacated the suspension order of August 31, 1953, and issued some oil and gas leases.

On December 20, 1955, the Director of the Fish and Wildlife Service asked the Director of the Bureau of Land Management to withhold action on all oil and gas lease offers for lands opened to unrestricted leasing because of certain inaccuracies in classification. By a letter dated February 6, 1956, the Chairman of the Committee on Merchant Marine and Fisheries of the House of Representatives notified the Secretary of the Interior that his committee was considering legislation to vest authority to dispose of wildlife refuges solely in Congress. He requested that the Department suspend its activities looking toward alienation of any interest in lands under the jurisdiction of the Fish and Wildlife Service until his committee had concluded its investigation. Thereupon, on February 6, 1956, the Bureau of Land Management directed its field officers to suspend action on all offers for oil and gas leases in fish and wildlife areas until March 1, 1956. This suspension was extended several times and on March 30, 1956, was made indefinite.

On October 11, 1957, notice was published in the Federal Register of a proposed revision of 43 CFR 192.9 (22 F. R. 8088). Paragraph (d) of the proposed regulation clearly stated that part or all of the Alaska wildlife areas might be closed to mineral leasing. Thereafter, a 2-day hearing was held on December 9 and 10, 1957, at which many proponents and opponents of the proposed regulation appeared, testified, and offered exhibits. A substantial portion of the testimony, both pro and con, was directed to the Kenai National Moose Range. The proposed regulation was modified as to form and adopted on January 8, 1958 (23 F. R. 227; Circular 1990). It was followed on July 24, 1958, by the agreement dividing the moose range into leasable and nonleasable areas.

The amended regulation provides that "All pending offers or applications heretofore filed for oil and gas leases covering game ranges, coordination lands, and Alaska Wildlife areas, will continue to be suspended until the agreements referred to in paragraph (b)(3) of this section shall have been completed." 43 CFR, 1958 Supp., 192.9(d).

Upon the approval of the agreement of July 24, 1958, all the offers pending for lands in the part closed to leasing were rejected.

In summary, the only period from August 31, 1953, to January 8, 1958, when the processing of oil and gas lease offers for lands in the Kenai moose range was not suspended was from December 6, 1955, to February 6, 1956, a period of two months. None of the offers on appeal was filed in that period. In other words, the appellants filed their offers at times [4] when it was well known that the Department was deeply involved in attempts to work out a solution to the problem of the conflicting demands for the utilization of the moose range and when it was perfectly apparent that one course of action the Department might

[4] The offers were filed at various times from May 21, 1954, to January 8, 1958.

adopt would be to close all or part of the moose range to leasing. In the circumstances, the appellants cannot properly allege that the fact that they filed offers raises any equitable considerations in their behalf. At best, they gambled that the lands they applied for would be opened to leasing. Having lost, they have little ground for complaint.

In any event, the determination of whether or not to lease tracts of public land under the Mineral Leasing Act is based upon the public interest, not upon whether one applicant managed to file an offer, or a series of offers, before the Secretary made his finding.

The offerors also assert that even if the Secretary has authority to determine in his discretion whether oil and gas leases should be issued for all or part of the moose range, it was unnecessary to prohibit oil and gas leasing on all or part of it in order to attain the purposes for which it was withdrawn. In support of these contentions they have submitted arguments and exhibits purporting to demonstrate that "oil is compatible with moose" or that the division made is illogical.

However, the proposed revision of 43 CFR 192.9 was published in the Federal Register and a hearing was held. The proposed regulation clearly provided that all or part of the range might be closed to oil and gas leasing. Many of the appellants or their representatives appeared at the hearing and made substantially the same arguments. In addition, other persons testified in support of their position. There was also, of course, a great deal of testimony in opposition.

The agreement reached between the Bureau of Land Management and the Fish and Wildlife Service and signed by the Secretary was arrived at in full awareness of all the factors involved and represents the considered judgment of the Bureaus and the Secretary that the division of the

moose range is the proper method of balancing the several components of the public interest in this area.

Another contention is that the Secretary has failed to comply with the requirements of the Administrative Procedure Act, 5 U. S. C., 1958 ed., sec. 1001 *et seq.* One argument is that the agreement of July 24, 1958, is rule making and that section 4 of the Administrative Procedure Act (5 U. S. C., 1958 ed., sec. 1003) requires notice and hearing of proposed rule making. First, as has been pointed out, notice was given and a hearing held on the proposed revision of 43 CFR 192.9. The agreement relating to the moose range was contemplated in the proposed regulation and all interested parties had ample opportunity to present their views. More important, the regulation involves the use of public property and "matters relating to public property are expressly excepted from the requirements of section 4 by the introductory paragraph of the section." *Wade McNeil et al.*, 64 I. D. 423, 429-430 (1957).[5]

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[5] The *McNeil* decision was attacked in court, *Wade McNeil* v. *Fred A. Seaton*, Civil No. 648-58, United States District Court for District of Columbia. On June 4, 1959, the court held for the defendant. In sustaining the validity of the special rule for grazing on public lands, which was attacked in the departmental proceedings, the court said, in answer to the contention that the proposed rulemaking provisions of the Administrative Procedure Act had not been observed in the adoption of the special rule:

> "The government relies on the exception involved in the phrase 'public property'. There is no doubt that public lands are public property. The rule here in question involved a matter relating to public lands and, therefore, public property. It follows, therefore, that the requirements of Section 1003 of Title 5, United States Code, do not apply to the adoption of the rule here in question."

Upon appeal, the decision of the District Court was reversed on the merits, but on this point the court said:

> "[Appellant] asks us to strike down the Special Rule on the ground, among others, that the rule was issued without notice and hearing. We do not agree with appellant on that proposition. * * * Again, the notice requirements of section 4 of the Administrative Procedure Act * * * contain an express exception when there is involved rule making relating 'to public property, loans, grants, benefits, or contracts'. That we are here dealing with matter relating to public property is obvious * * *." *McNeil* v. *Seaton*, 281 F. 2d 931, 936 (D. C. Cir. 1960).

In the alternative, it is contended that the agreement is an adjudication which, under section 5 of the Administrative Procedure Act (5 U. S. C., 1958 ed., sec. 1004) requires that the notice and hearing procedure of that section be followed. However, the provisions of the Administrative Procedure Act do not apply to determinations relating to the issuance of an oil and gas lease because no hearing is required by the Mineral Leasing Act, *Northern Pacific Railway Company et al.*, 62 I. D. 401, 410 (1955), nor have the offerors any rights which require a hearing to satisfy the due process requirements of the Constitution. See *United States* v. *Keith V. O'Leary et al.*, 63 I. D. 341 (1956).

In addition to the offerors, the Standard Oil Company, which entered into an oil and gas development contract with the United States of America on July 14, 1954, for an area which includes a portion of the area in the moose range closed to leasing has filed a motion to intervene and presented arguments in favor of the offerors from whom it has acquired options. The motion to intervene is allowed. In addition to the arguments made by one or more of the appellants, Standard contends that the rejection of the lease offers violates its rights under the contract. However, I can find nothing in the contract which obligated the United States in any way to issue leases within the moose range, or indeed, anything which assures Standard that any leases within the moose range will be optioned to it.

Standard submitted the development contract for approval by a letter dated May 14, 1954. The letter recited that various individuals "are holders of or have filed" offers for lands in the southerly portion of the Kenai Peninsula; that Standard has been offered operating agreements "covering leases heretofore issued and which shall hereafter be issued pursuant to lease offers filed by individuals as aforementioned"; and that Standard is willing to acquire such operating agreements provided the development contract is approved. It is interesting then to note

that the only offers listed in Standard's motion to intervene were filed on May 21, 1954, seven days after Standard submitted the development contract for approval, and that Standard did not acquire options on the offers until June 15, 1954.

Moreover, Standard's letter of May 14, 1954, stated:

> "The proposed contract places no restriction whatsoever on the leasing by the United States under the General Leasing Act or otherwise, of any Public Domain or Territorial School lands located within the area defined in the contract."

Furthermore, section 17 of the contract provides that " * * * no operations shall be conducted pursuant to this agreement upon any lands included in such range without prior approval of the appropriate controlling Federal agency." This provision makes it clear that Standard entered into the contract without any assurance that lands in the moose range would be made available to it.

Finally, there is still more acreage within the area covered by the development contract than Standard may hold under it.

I find Standard's contentions, therefore, to be without merit.

Therefore, the decisions of the Director and Acting Director of the Bureau of Land Management are affirmed.

(Sgd) JOHN A. CARVER, JR.
Assistant Secretary of the Interior

7. Excerpts from Transcript of Proceedings on Motion to Dismiss August 2, 1962

(Filed 8/17/62)

(District Court Captions omitted)

District Court Docket Nos. 293-62 to 299-62, incl.

Washington, D. C.
Thursday, August 2, 1962

The above-entitled matters came on for hearing on motion of the defendant to dismiss before The Honorable EDWARD A. TAMM, Judge, United States District Court for the District of Columbia.

APPEARANCES:

For the plaintiffs: H. ST. JOHN BUTLER, Esq., EDWIN R. SCHNEIDER, JR., Esq., and AMOS J. PEASLEE, JR., Esq.

For the defendant: HERBERT PITTLE, Esq., United States Attorney.

ARGUMENT IN OPPOSITION TO MOTION TO DISMISS

By MR. BUTLER:

MR. BUTLER: May it please Your Honor, my name is St. John Butler. I am the attorney for the plaintiffs in Civil Actions 293-62 to 299-62, inclusive.

Before proceeding with my argument, I would like to state briefly the theory of my case is different from the theory advanced in the *Duesing Case* in that we claim that there are material issues of fact, for which reason summary judgment should not be granted and that the closing of the Moose Range was in fact a withdrawal for which the Secretary had no statutory authority, and for the final reason that we believe that we can prove by tracing the history of the Mineral Leasing Act as amended and the

legislative history of the Act that the plaintiffs did have vested rights to non-competitive gas and oil leases.

If you will permit me, I would like to proceed with my presentation: First, I would like to read, so the Court will have clearly before it, the issues raised in the plaintiffs' complaint as set forth on page 6 of my points and authorities, and I will read them briefly.

The first question is: Was the closing of lands in the Kenai National Moose Range, Alaska, from oil and gas leasing under the agreement of July 24, 1958 in fact a withdrawal of the lands?

Question number 2 is: Does the defendant have authority under the Mineral Leasing Act of 1920 to withdraw lands in the public domain from oil and gas leasing or did he exceed his statutory authority?

The third question is: Did the defendant exercise his purported discretionary authority arbitrarily and capriciously or in accordance with a finding of facts which demonstrate that oil and gas leasing is not compatible with the management of the Southern half of the Moose Range?

Question number 4 is: Does the plaintiff have a vested right to oil and gas leases?

Your Honor, the plaintiffs contend that the defendant's motion to dismiss for failure to state a claim should be heard as a motion for summary judgment under Rule 12(b)(6) and Rule 56 of the Federal Rules of Civil Procedure.

I cited several cases on page 3 of my Points and Authorities with respect to summary judgment. I would like to read briefly from one of them, that is the case of *Callaway* v. *Hamilton National Bank of Washington, et al.*, 90 U.S. Appeals D.C. 228; 195 F.2d 556 in which the Court said at page 559:

> "In dealing with the record on this appeal, however, we must observe the usual rule that on a motion to dis-

> miss, the plaintiff's allegations are to be taken as true and all reasonable favorable inferences arising therefrom are to be indulged. * * * A motion to dismiss should not be sustained 'unless it appears to a certainty that a plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim' set forth by the plaintiff."

All of the issues, Your Honor, raised by the plaintiff, as outlined in my Points and Authorities, involve questions of fact to determine whether the defendant acted arbitrarily and capriciously without statutory authority. But two basic ultimate facts are involved Your Honor: First, are oil and gas operations in the Kenai National Moose Range compatible with the management for the range of wildlife purposes?

Second, did the defendant exercise his purported authority to close the Southern half of the Moose Range from oil and gas leasing arbitrarily and capriciously?

The affidavits filed by the plaintiff, of which there are eight, Your Honor, all are to the effect oil and gas leasing is compatible with the management of the Moose Range for wildlife purposes. The defendant has not disputed these facts as set forth in the affidavits and, therefore, I respectfully submit, Your Honor, they should be taken by the Court as true to show that oil and gas leasing is compatible with the management of the entire moose range.

A comparison of the answers in the plaintiffs' admission and evidence on discovery will illustrate the issues of fact which the defendant neither denied nor admitted. Questions 7 to 13. The plaintiffs should have an opportunity to prove these facts and show that only 699 acres out of a 1,442,840 acres within the tertiary basin are less than one-half of one percent of the surface area of the Range might possibly be used for oil production.

Under questions 18 and 20, the defendant denies that keeping the Northern half of the Moose Range open for

oil and gas leasing clearly indicates that oil and gas operations are compatible with the management of the entire range.

On the contrary, a draft memorandum, dated January 16, 1958, from the Assistant Secretary, Department of the Interior for Fish & Wildlife Service to the Secretary states that the bulk of the winter range of the moose lies in the area where oil and gas has been found, which is in the Northern half of the range which has been left open to leasing.

With permission of counsel for the defendant, I would like to read a short extract from that letter. This letter was made available to me on discovery——

THE COURT: Just address the Court. Don't address counsel.

MR. BUTLER: Pardon me, Your Honor. May I read from it, sir?

THE COURT: You may.

MR. BUTLER: (Reading) In interpretation of classification of the Bureau of Sports, Fisheries & Wildlife, it should be recalled that no single section of land here takes care of the year-around habitat requirement of the moose. The moose, through centuries of use, are conditioned to certain definite wintering grounds, summer range, preferred calving and feeding areas and instinctively resort to various types of areas it requires. In the overall reserve for the wildlife held out for oil and gas production, all of the giant Kenai moose habitat requirements are well met with the exception of the winter range. Unfortunately the bulk of the winter range lies within the area where oil and gas have been found and geologically evidence points to further findings of oil and gas in this portion of the range.

So, Your Honor, I ask how under the above state of facts the defendant can contend that oil and gas leasing

is compatible with the management of the Northern half of the range but not compatible with management of the Southern half of the range?

Furthermore, Your Honor, the plaintiff can prove from the evidence made available on discovery that the decision to close the Southern half of the range had already been made unilaterally by the Fish & Wildlife Service prior to the public hearings held on December 9th and 10th, 1957 on the proposed revision of the regulations governing leasing of wildlife refuge lands, later approved on January 8, 1958, 43 CFR, 192.9, Circular 1990, 23 Federal Register 227. Your Honor, that is Exhibit "H".

At this point, Your Honor, I would like to say that the counsel for the defendant stated that hearing were held on the closing of the Moose Range. That I do not believe is correct, Your Honor. Hearings were held on proposed regulations which later permitted the closing of the range.

The plaintiffs should have an opportunity to prove at a trial the facts as to compatibility and that the defendant acted arbitrarily and capriciously in closing the range and promulgating a regulation to justify action which had already been taken for which he had no legal authority.

Your Honor, on that point that is my contention, that summary judgment should be denied because there are material issues of fact. Now, if I may, I would like to proceed with the questions of law.

Your Honor, the first issue raised by the plaintiffs' complaint is whether the closing of the Southern half of the moose range by the defendant under the agreement of July 24, 1958, 23 Federal Register 5883—Your Honor, that is Exhibit "B" attached to my complaint—was in fact a withdrawal of lands in the public domain from oil and gas leasing or the exercise of the defendant's discretionary authority to issue leases.

The withdrawal and reservation of Federal lands under Executive Order 10355 of May 26, 1952, 17 Federal Register 4831, is governed by regulations issued by the Department of the Interior, 43 CFR 295, Circular 1982 published in the Federal Register of August 17, 1957. That is Exhibit "G" of my complaint.

The defendant states in his decision in the appeal of *Richard K. Todd, et al.*, of October 30, 1961—that is Exhibit "A" of my complaint—"aside from Executive Order No. 10355 the Secretary has only limited statutory authority to withdraw public lands, e.g., 43 U.S.C. 1958 edition, Section 300 (stock-driveway withdrawals) and 43 U.S.C., 1958 edition, Section 416 (reclamation withdrawals)."

The opinion goes on to state: "To my knowledge he has never asserted that he had authority under the Mineral Leasing Act to withdraw land from leasing."

Regulations approved December 8, 1955 and in effect during the time the plaintiffs' offers to lease were pending, 43 CFR 192.9, Circular 1945, 20 Federal Register 9009, permitted oil and gas leasing of wildlife refuge land under operating plans approved by the Fish & Wildlife Service. On January 9, 1958 this regulation was amended, 43 CFR 192.9, Circular 1990, 23 Federal Register 227—that was the amendment made as a result of the public hearing—to separate wildlife refuge lands into several categories including Alaska wildlife areas under the authority of Section 32 of the Mineral Leasing Act of 1920, 401 Stat. 450, 30 U.S.C. 189.

The amended regulation provided that representatives of the Bureau of Land Management and the Fish & Wildlife Service would enter into an agreement as to these lands which shall not be subject to leasing. The Secretary of the Interior approved an agreement closing the Southern half of the Kenai National Moose Range from leasing on July 24, 1958, 23 Federal Register 5883. That is Exhibit

"B" of my complaint. The plaintiff contends that this was in fact a withdrawal of the lands from leasing.

The question of what constitutes a withdrawal was raised in the case of *Wilbur, Secretary of the Interior* vs. *United States ex rel. Barton*, 46 F. 2d 217 in 1930, the Court said:

"On March 13, 1929, the Department of the Interior sent instructions to the General offices and all local land officers not to receive further applications for permits to prospect for oil and gas on the public domain and to reject all application now pending in accordance with a statement by the White House that 'there will be complete conservation of Government oil in this Administration' ".

The question presented to the Court was: Did the orders of the Secretary of the Interior amount to a temporary withdrawal of public lands from location entry and exploration for the purpose of discovering oil and gas?

The Court said: "There can be no doubt that the effect of the orders issued by the Secretary was to withdraw from further location entry and exploration for the discovery of oil and gas all public land, and that the purpose of such withdrawal was to meet conditions due to great overproduction and to conserve oil and gas in the public interest."

The Court upheld the action of the Secretary under the theory that his withdrawal was the withdrawal of the President for which he, the President, had authority.

The amended regulations of January 8, 1958—that is Exhibit "H"—under Section 192.9(e) provides: "Lands in requested withdrawal"—If Your Honor please, this is the regulation under which the defendant asserts that his action was a closing and not a withdrawal. The caption of the Section is "Lands in requested withdrawal." "All existing offers or applications for oil and gas leases covering lands included in requests for withdrawals for wildlife

refuges, game ranges, coordination lands or Alaska wildlife areas, as defined herein, shall be suspended until after the consummation of the withdrawal and thereafter such offers shall be considered in accordance with the provisions of this section."

The agreement of July 24, 1958 states that: "Notice is hereby given that pursuant to the regulation 43 CFR 192.9, Circular 1990, agreement as reflected by the map herein referred to has been consummated between the Bureau of Land Management and the United States Fish & Wildlife Services of this Department."

Notwithstanding that self-serving declaration of the defendant that he closed the lands in the Moose Range in exercise of discretionary authority, they were closed under regulation contemplating withdrawals. The agreement of July 24, 1958 used the words "agreement has been consummated", meaning the consummation of a withdrawal as provided for in the regulations.

How can the defendant assert that he did not withdraw the lands but merely exercised his discretionary authority to lease or not to lease?

Your Honor, the second issue raised in the plaintiff's complaint is whether the defendant has authority under Section 32 of the Mineral Leasing Act, 41 Stat. 450, 30 USC 189, to close or withdraw large areas of land in the public domain from leasing. Section 32 provides in part: "The Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this Act."

Your Honor, the purpose of the Act is, as stated in the Act: "An Act to promote the mining of coal phosphate, oil shale, oil and gas, and sodium in the public domain."

The plaintiffs contend that the amended regulation of January 8, 1958 and the agreement of July 24, 1958 are

in conflict with the purposes of the Leasing Act. They go far beyond that which is necessary and proper to carry out the purposes of the Act.

The Supreme Court in the case of *Miller* v. *United States,* 294 U.S. 435, 1935, said at page 439—and I am reading from page 9 of my Points and Authorities—: "It (the administrative regulation) is invalid because not within the authority conferred by the statute upon the Director (or his successor, the Administrator) to make regulations to carry out the purpose of the Act. It is not, in the sense of the statute, a regulation at all, but legislation. * * * This is beyond administrative power. The only authority conferred, or which could be conferred by the statute, is to make regulations to carry out the purposes of the Act."

And I read from the case of *Manhattan General Equipment Company* v. *Commissioner of Internal Revenue,* 297 U.S. 129, at page 134 and 135 on page 10 of my Points and Authorities: "The power of an administrative officer or board to administer a Federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity. And not only must a regulation, in order to be valid, be consistent with the statute, but it must be reasonable."

Senate Report No. 1392, 79th Cong. 2d Section on the Act of August 8, 1946, 60 Stat. 951, said in amending the Mineral Leasing Act of 1920: "The Bill is the first general revision of the Mineral Leasing Act since the Act of August 21, 1935. At that time the Nation had an abundance of petroleum. The center of gravity, so far as the production of oil and gas is concerned, was in the Western Hemisphere, today it is being shifted to the Eastern Hemisphere, although in the past 85 years 63.8 percent of all world

petroleum came from the United States, today the Nation possesses but 32 percent of the estimated crude oil reserves of the world. World War II has demonstrated beyond preadventure of doubt that the salvation of the Nation demands that we develop our petroleum reserves to the utmost extent, to the end that this Nation shall not risk loss of either industrial or political leadership.

The bill is designed to stimulate the discovery of new petroleum reserves; to promote the development of oil and gas on some 300,000 square miles of potential oil lands on the public domain."

The plaintiffs contend that this statement proves that the purpose of the Mineral Leasing Act is to promote leasing and that the defendant cannot unreasonably restrict leasing. The defendant is not carrying out the intent of Congress and purposes of the Mineral Leasing Act in unreasonably and arbitrarily restricting oil exploration.

The Constitution of the United States under Article IV, Clause 2, Section 3 provides: "The Congress shall have the power to dispose of and make all needful rules and regulations respecting the territory of the United States."

The intent of Congress to limit the authority of the Executive Branch of the Government with respect to withdrawals is clearly shown by the Pickett Act of June 25, 1910, 36 Stat. 847, which provides and I read a short quotation from page 10 of my Points & Authorities:

"The President may, at any time, in his discretion, temporarily withdraw from settlement, location, sale or entry any of the public lands of the United States, including the District of Alaska and reserve the same for waterpower sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.

"Sec. 3. That the Secretary of the Interior shall report all such withdrawals to Congress at the beginning of its next regular Session after the date of withdrawal."

The defendant admits that he has no authority under the Mineral Leasing Act of 1920 to make withdrawals in his decision of October 30, 1961, which states on page 7: "To my knowledge he (the Secretary) has never asserted that he had authority under the Mineral Leasing Act to withdraw lands from leasing."

Nothwithstanding this statement, the amended regulation 43 CRF 192.9 published in the Federal Register of January 8, 1958, was issued under the authority of Section 32 of the Mineral Leasing Act.

In fact, the defendant in his answer to question 17 of the plaintiff's requests for admissions, admits that only technically the closing of the Southern half of the Moose range did not constitute a withdrawal. As held by the Court in the *Wilbur* case cited previously, the effect of the agreement of July 24, 1958 was to withdraw the lands from leasing.

Judge Holtzoff. in the recently decided case on July 17, 1962, in the case of *Pan American World Airways, Inc.* vs. *The Civil Aeronautics Board,* No. 1236-1962, said: "The CAB made an ex parte decision to terminate Pan Am's route and then set hearings giving Pan Am opportunity to show cause why the Order should not be put into effect."

The Board subsequently amended the Order to eliminate the word "terminate".

The Board had authority under 49 U.S.C. 1371(g) to alter, amend or suspend a certificate of public convenience or necessity for intentional failure to comply with the law or regulations or to revoke for failure to comply with Orders after notice and hearings. It had no authority to terminate or cancel in any other way.

Judge Holtzoff said the Board may not achieve by indirection what it is powerless to accomplish directly. It may not avoid a statutory restriction on its authority by substituting the word "revoked" for the word "terminate".

Judge Holtzoff also said, "A decision in the Court of Appeals in the case of the matter of Granram Wing Liquor Corp. v. O'Connell, 295 N.Y. 336 is on all fours. There the State Liquor Authority sought to 'cancel' a liquor license rather than 'revoke' it because it was not empowered to do the latter. The Court held that the State could not deprive the licensee of his rights by calling its action a 'cancellation' instead of a revocation."

Judge Holtzoff held that the Civil Aeronautics Board must proceed in accordance with the provisions of the statute.

Likewise, the plaintiff submits that the defendant cannot call the closing of the Southern half of the Moose range an exercise of discretionary authority when it is in fact a withdrawal for which he has no authority under the Mineral Leasing Act.

Your Honor, the third issue raised by the plaintiff is whether the defendant acted arbitrarily and capriciously.

Six memoranda only were produced by the defendant on discovery as a record of conferences between the Bureau of Land Management and the Fish & Wildlife Service leading to the closing or withdrawal of the Southern half of the Moose range from leasing.

The first five, dated August 30, September 18, 25 and 30 and November 1, 1957, were all between offices of the Director, Bureau of Sport Fisheries and Wildlife, Washington, D. C. and local wildlife service offices in Alaska. The sixth, dated January 23, 1958, was from the Director, Bureau of Land Management, Washington, D. C. to the Area 4 Administration, Alaska.

Notice of the proposed hearings on the revision of the regulations 43 CFR 192.9 were published in the Federal Register of October 11, 1957, 22 CFR 8088. Hearings were heard on the proposed revisions on December 9 and 10, 1957. The amended regulations were approved January 8, 1958.

In other words, the decision to close the Southern half of the Moose range had already been made before hearings were held. The plaintiffs contend that the defendant in so doing acted arbitrarily and capriciously to justify a decision which had already been made, the effect of which was to call a withdrawal a closing and to deny the plaintiffs an opportunity to be heard under regulations in effect at the time their offers to lease were filed.

The agreement of July 24, 1958 closed the Southern half of the Moose Range to all oil and gas leasing because such activities would be incompatible with the management of the range for wildlife purposes.

I previously pointed out to you, Your Honor, in answers to the admissions that the defendant denied that keeping of the Northern half of the range open clearly indicated that the management of the entire range was compatible with oil and gas leasing. He said that he admitted this only indicated the management of the Northern half of the range. I previously referred to the letter which was written by the Assistant Wildlife showing that the bulk of the winter range lies in the Northrn half.

Therefore, Your Honor, the plaintiffs submit that the defendant's action in closing the Southern half of the Moose Range was arbitrary and capricious.

Your Honor, the fourth and final issue raised by the plaintiff is whether they have a vested right to lease under regulations which were in effect at the time their offers to lease were filed, which permitted leasing on oil and gas lands subject to conditions specified by the Fish & Wildlife Service.

Your Honor, if I may ask you to refer to pages 18 and 19 of my Points and Authorities, it will make my brief discussion from this point.

THE COURT: I have page 18 before me.

MR. BUTLER: Thank you, sir.

The original Mineral Leasing Act of 1920 recognized two categories of permits or leases set out in separate sections 13 and 17 of the Act. These were proven or competitive leases on lands within the known geological structure of a producing oil and gas field. The second category was Wildcat or non-competitive permits on lands not within any known geological structure of a producing oil or gas field.

On August 21, 1935, Section 17 of the Leasing Act was amended to cover both competitive and non-competitive leases as follows:

"* * * All lands subject to disposition under this Act which are known or believed to contain oil and gas deposits, except as hereinafter provided, may be leased by the Secretary of the Interior . . . to the highest responsible qualified bidder by competitive bidding under general regulations . . ."

You will note, Your Honor, they have changed the words "known geological structure of a producing oil and gas field" to the words "known or believed".

These were the same lands described in the original Act as lands "within the known geological structure of a producing oil and gas field". Thus the lands "known or believed" to contain oil and gas formed a complete category of lands which may be leased by the Secretary in his discretion under competitive bidding.

As to the other category of wildcat or non-competitive leases, the 1935 Act amended Section 17 to read:

"* * * Provided further, that the person first making application for a lease of any lands not within any known geological structure of a producing oil or gas field who is qualified to hold a lease under this Act . . . shall be entitled to a preference right over others . . ."

Your Honor, those words "shall be entitled to a preference right" have been properly interpreted, I believe, to mean that he has a preference right over all others; not a preference right against the Government.

These were the same lands described in the Mineral Leasing Act as "not within any known structure of a producing oil and gas field" on which prospecting permits were granted. Under the 1935 Act, the first person making application was entitled to a preference right.

Section 17 of the Mineral Leasing Act was again amended on August 8, 1946 to read with respect to the first category, that is, competitive leases: "All lands subject to disposition under this Act which are known or believed to contain oil or gas deposits may be leased by the Secretary of the Interior. When such lands to be leased are within any known geological structure of a producing oil and gas field, they shall be leased to the highest responsible bidder by competitive bidding under general regulations . . . "

These are the same lands described in the original Act as "within the known geological structure of a producing oil and gas field" and in the 1935 Act as lands "known or believed to contain oil and gas deposits" which the Secretary may lease by a competitive bidding.

The fact that Congress in the 1946 amendment referred to these lands in two short sentences instead of one long sentence does not change the identity of the lands which may be leased.

The 1946 Act further amended Section 17 of the 1935 Act with respect to wildcat or non-competitive leases to read: "When the lands to be leased are not within any known structure of a producing oil or gas field, the person first making an application, who is qualified to hold a lease under this Act shall be entitled to a lease of such lands without competitive bidding . . ."

It is pointed out that the 1946 Act eliminated the words "shall be entitled to a preference right" and substituted the words "shall be entitled to a lease". The statement made in Senate Report 1392 shows the intent of Congress was to give the first applicant a vested right to a lease. In fact, the Senate Bill originally introduced contained the world "shall be entitled to a preference right over others" whereas the Bill as finally enacted substituted the words "shall be entitled to a lease".

The Assistant Secretary of the Interior, Oscar L. Chapman, wrote a letter to The Honorable Carl A. Hatch, Chairman of the Committee on Public Lands and Surveys, on March 15, 1946 on Senate Bill 1236, later enacted as the Act of August 8, 1946. The letter said—if you would like to have it, Your Honor, I can give you the letter. It is not in my Point and Authorities.

THE COURT: It is not necessary.

MR. BUTLER: Briefly the proposed changes in the Bill are as follows—I will only read the ones that are applicable: "Only a land in known geological structures of producing oil or gas fields would be subject to competitive leasing. Now any lands known or believed to contain oil or gas may be leased competitively."

In other words, the original Bill 1236 enacting the 1946 Act just used the word "known" whereas under the 1935 Act, the Secretary already had authority to lease competitive lands known or believed.

Mr. Chapman went on to say: "I see no justification for limiting the right to lease lands by competitive bidding to known structures of producing oil or gas fields, as proposed in the second sentence of Section 17 of the Bill. Under present law the Secretary of the Interior is authorized to lease by competitive bidding lands known or believed to contain oil or gas. The real extent of oil or gas structures prior to complete development is often difficult to determine with any degree of precision. Conferring upon the Secretary authority to lease by competitive bidding lands known or believed to contain oil or gas affords sufficient latitude to sell competitively to the highest bidder lands which, although technically unproved, are recognized by geologists as valuable for oil or gas."

What could be clearer to show that the words "may be leased" and "known or believed" in the 1946 Act refer only to competitive leases and not to non-competitive leases and that the person first making application for non-competitive leases is qualified to hold a lease and has a vested right to the issuance of the lease which the Secretary has no discretion or authority to deny.

I am almost finished, Your Honor. I apologize for taking so much time.

THE COURT: Is this the end of the quotation from the letter?

MR. BUTLER: No, sir, the last thing I said was not a part of the quotation.

THE COURT: I am going to suspend this hearing at this time until 2:00 o'clock. The Court has other business which must be transacted, including some 100 probate orders. I will suspend this hearing until 2:00 o'clock.

MR. BUTLER: Thank you, Your Honor.

(Whereupon, at 12:30 p.m., a recess was taken until 2:00 p.m. the same day.)

2:00 p.m.

AFTERNOON SESSION

THE COURT: You may proceed, Mr. Butler.

MR. BUTLER: Yes, Your Honor.

THE COURT: You had read from Assistant Secretary Oscar Chapman's letter to Senator Hatch. You had added a sentence of your own observation at the time that we adjourned.

MR. BUTLER: Thank you, Your Honor. Would you like me to read that again, sir?

THE COURT: No. It is unnecessary.

MR. BUTLER: The reading of that paragraph concluded "sufficient latitude to sell competitively to the highest bidder lands which, although technically unproved, are recognized by geologists as valuable for oil or gas."

My comment was, What could be clearer to show that Congress intended the words 'may be leased' and 'known or believed' refer only to competitive leases. Secondly, that the fact that the Bill originally in respect to non-competitive leases, the words 'shall be entitled to a preference right' and those were changed to 'shall be entitled to a lease'. That means that the two should be treated separately.

Your Honor, the defendant relies wholly on the case of *Haley* vs. *Seaton*, 281 Fed. 2d 620, as justification for the fact that the defendant Secretary had discretionary authority to lease or not to lease lands under non-competitive leases.

In the *Haley* case, the Secretary rejected the offers to lease on the grounds that by the Act of September 2, 1958, 72 Stat. 1686, Congress had placed the lands within the Navajo Reservation and, therefore, they were not available for leasing under the Mineral Leasing Act of 1920.

The Court said: "Since the application for leases had not been accepted by the Secretary at the time the Act of September 2, 1958 was enacted, Congress under its Constitutional power to make all needful rules and regulations respecting 'the public lands' had the power to withdraw the lands described in such applications from the public domain and restore them to the Navajo Reservation, if they were not then a part of such Reservation."

The Court cited the Constitution of the United States, Article 4, Sections 3, Clause 2 showing that only Congress has the power to make rules and regulations governing the withdrawals of public lands from leasing, which it has done under the Picket Act.

The plaintiff submits to the Court that the discussion by the Court in the *Haley* case as to the vested rights and discretionary authority on the assumption that the lands were in the public domain was not necessary to a decision in the case and is pure *obiter dicta.*

Therefore, Your Honor, the plaintiffs respectfully request that the defendant's motion for a summary judgment or his motion to dismiss be denied for the reason that there are genuine material issues of fact. But, if Your Honor should find that there are not material issues of fact, that the defendant's motion for summary judgment should be granted to the plaintiffs for the reason that the plaintiffs are entitled as a matter of law to summary judgment.

Now, Your Honor, briefly in conclusion, I would like to point out what I feel is the difference in the *Duesing Case* and the plaintiffs' case: In the *Duesing Case,* the defendant submitted a motion to dismiss. The plaintiff submitted a motion for summary judgment and the defendant submitted a cross-motion for summary judgment. That is, both sides said there were no material issues of fact. Judge Holtzoff recognized this in his opinion when he said: "The salient facts are few".

Also, the theory of the Duesing case was primarily, in my mind, on the discretionary authority of the Secretary. The plaintiff in the Atwood case and the other cases contend that the closing of the Southern half of the Kenai Moose Range was in fact a withdrawal for which the secretary had no discretion—had no authority under the Mineral Leasing Act of 1920. He could have closed some lands under the Pickett Act and under his own regulations governing withdrawals.

Plaintiff contends that there should be a trial of the case on its merits in order for the plaintiff to show that the defendant acted arbitrarily and capriciously in closing the lands from leasing.

Finally, the plaintiff contends that in the final analysis, a review of the history of the Mineral Leasing Act as amended and the Congressional Report on Senate Bill 1236 which resulted in the enactment of the Mineral Leasing Act of August 8, 1946, clearly shows that the plaintiff has a vested right to a non-competitive lease and the defendant has no discretionary authority to deny it.

Thank you, Your Honor.

8. Order Granting Defendant's Motion to Dismiss

(Filed 8/7/62)

(District Court captions omitted.)

District Court Dockets Nos. 293-62 to 299-62, incl.

Judgment

This case having come on for hearing on defendant's motion to dismiss for failure to state a claim upon which relief can be granted, and the Court having heard argument of counsel and considered the material filed in support of the motion and in opposition thereto, and upon consideration thereof, it is ORDERED:

The defendant's motion to dismiss is granted and judgment is hereby entered against the plaintiff and in favor of the defendant and the amended complaint is hereby dismissed.

Dated this 7th day of August, 1962.

/s/ EDWARD A. TAMM,
Judge, United States District Court.

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,358

BERT F. DUESING,

Appellant,

v.

STEWART L. UDALL,
Secretary of the Interior,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 17,358

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Appellant,

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Secretary of the Interior,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOINT APPENDIX

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IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Bert F. Duesing P. O. Box 244 Big Lake, Texas Plaintiff	)	
vs.	)	Civil Action No. 290-'62
Stewart L. Udall Secretary of the Interior Washington 25, D. C. Defendant	)	

RELEVANT DOCKET ENTRIES

1962

Jan. 26 -	Complaint, Appearance, Exhibits A through K inclusive
March 29 -	Stipulation extending time for deft. to answer to April 30, 1962
April 17 -	Motion of deft. to dismiss complaint; P & A
Apr. 24 -	Stipulation extending time for pltf. to oppose deft's motion to dismiss until May 15, 1962
May 15 -	Motion of pltf. for summary judgment and opposition to deft's motion to dismiss; P & A; Exhibits (4); statement of facts
May 25 -	Motion of deft. for summary judgment; P & A; statement; response to pltf's statement
July 23 -	Order granting motion of deft for summary judgment and denying motion of pltf for summary judgment; judgment for deft; dismissing complaint. Holtzoff, J.

July 24 - Motion of pltf to modify order of July 23, 1962 (consent)

July 25 - Order amending order of July 23, 1962, to show deft's cross-motion for summary judgment granted; pltf's motion for summary judgment denied; judgment entered for deft against pltf and complaint dismissed. Holtzoff, J.

July 27 - Transcript of proceedings Volume I, pages 1-5, July 17, 1962 (Rep. Gerald Nevitt) Court's copy.

Sep. 18 - Notice of appeal by pltf on judgment entered July 25, 1962. Deposit $5.00 by Barash

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[Filed January 26, 1962]

COMPLAINT FOR DECLARATORY JUDGMENT AND OTHER RELIEF

The plaintiff for his complaint represents as follows:

1. The plaintiff is a citizen of the United States and of the State of Texas, and is a resident of the State of Texas.

2. The defendant is the Secretary of the Interior of the United States and as such is charged with the administration of the laws relating to the public lands, including the Mineral Leasing Act of Frebruary 25, 1920, c. 85, 41 Stat. 437, as amended, 30 U.S.C. 181, et seq. The official residence of the defendant is the District of Columbia.

3. The matter in controversy, exclusive of interest and costs, exceeds $10,000.00.

4. The jurisdiction of this Court is invoked under Title 11, Section 306 of the District of Columbia Code, upon the ground of diversity of citizenship, and upon the further ground that the construction and interpretation of a Federal Statute and regulations are involved and required. Plaintiff seeks relief under the terms of Section 10 of the Administrative Procedure Act of June 11, 1946, 60 Stat. 243, 5 U.S.C. 1009, and under the terms of 28 U.S.C. 2201 and 2202 relating to Declaratory Judgments.

The Court has jurisdiction also by virtue of its inherent power to grant injunctive relief in the premises.

5. This case is concerned with the unlawful, unreasonable and arbitrary action of the defendant in failing and refusing to issue to plaintiff oil and gas leases covering the land in suit to which plaintiff, as the first qualified applicant, is entitled under the statute and regulations hereinafter referred to, and under the decisions, rulings and administrative practice of the Department of the Interior.

6. The land in suit embraces 20,480 acres in the Kenai National Moose Range on the Kenai Peninsula, Alaska. At all times herein material the 20,480 acres were public lands of the United States believed to contain oil and gas deposits and were not within any known geological structure of a producing oil or gas field. The land in suit is more particularly described in Appendix A annexed hereto and made a part of this complaint.

Under the Act of August 8, 1946, c. 916, Sec. 3, 60 Stat. 951, 30 U.S.C. 226, amendatory of the basic Mineral Leasing Act of February 25, 1920, 41 Stat. 437, the Secretary of the Interior is authorized to lease such oil and gas lands. The Act mandatorily requires that:

> * * * When the lands to be leased are not within any known geological structure of a producing oil or gas field, the person first making application for the lease who is qualified to hold a lease under this Act shall be entitled to a lease of such lands without competitive bidding. * * *

7. Section 32 of the Mineral Leasing Act, as amended (30 U.S.C. 189), authorizes the Secretary of the Interior to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of the Act. Pursuant thereto, the Secretary promulgated a regulation which he approved December 8, 1955, identified in the Department of the Interior as Circular 1945. The regulation was codified as 43 CFR 192.9 and was published in Volume 20, Federal Register, at page 9009. It is annexed hereto as EXHIBIT A and made a part of this complaint.

In this regulation, Circular 1945, the Secretary described certain areas as "Appendix A - Fish and Wildlife Service Lands Not Available for Leasing"; other areas as "Appendix B - Fish and Wildlife Service Lands Available for Leasing Under a Satisfactory Development and Operating Plan"; with all the remaining areas under the jurisdiction of the Fish and Wildlife Service available for leasing without qualification. The land in suit covering 20,480 acres in the Kenai National Moose Range falls in the latter category.

8. On August 9, 1957, plaintiff filed in the Anchorage, Alaska, land office of the Bureau of Land Management, in accordance with the governing regulation 43 CFR 192.9, Circular 1945, nine lease offers for noncompetitive oil and gas leases identified as Anchorage 036561 to 036569 inclusive covering a total of 20,480 acres in suit. The lease offers were submitted in proper form and were accompanied by filing fees and first year lease rentals as required by the applicable regulations. Defendant accepted the filing fees and rentals. Plaintiff's telegram of August 21, 1957, to the Anchorage land office and the Manager's letter of reply of August 22, 1957, are annexed hereto as EXHIBIT B and EXHIBIT C, respectively, and made a part of this complaint. Plaintiff was and is the person first making application for noncompetitive leases covering the 20,480 acres who is qualified to hold leases under the Act.

9. Approximately five months after plaintiff filed lease offers Anchorage 036561 to 036569, inclusive, in the Bureau of Land Management in accordance with the then applicable regulation 43 CFR 192.9, Circular 1945, the Secretary amended 43 CFR 192.9 by approving a new regulation on January 8, 1958. This regulation is identified in the Department of the Interior as Circular 1990 and was published in Volume 23, Federal Register, at page 227. It is annexed hereto as EXHIBIT D and made a part of this complaint.

10. Section 192.9 (b)(3) of the amended regulation approved January 8, 1958, Circular 1990, provides in pertinent part:

> As to game range lands and Alaska wildlife areas, representatives of the appropriate office of the Bureau of Land Management and the United States Fish and Wildlife Service will confer for the purpose of entering into an agreement specifying those lands which shall not be subject to oil and gas leasing. No such agreement shall become effective, however, until approved by the Secretary of the Interior.

Acting pursuant to the above-quoted regulation the Secretary published notice in the Federal Register on August 2, 1958, 23 FR 5883, of an agreement between the Bureau of Land Management and Fish and Wildlife Service, which he approved on July 24, 1958, designating certain lands within the Kenai National Moose Range as closed to oil and gas leasing - with the balance of the lands declared open to leasing. On the basis of this agreement the area closed to oil and gas leasing comprises about 1,689 square miles covering the Southern half of the Range, including the land in suit. The area open to leasing comprises about 1,525 square miles covering the Northern half of the Range.

The Secretary's notice marked EXHIBIT E, the map referred to therein marked EXHIBIT F, and a statement of the Secretary of January 29, 1958, released by the Department's Information Service marked EXHIBIT G, are annexed hereto and made a part of this complaint.

11. In two decisions dated August 13, 1958, and August 20, 1958, the Manager of the Anchorage land office rejected plaintiff's oil and gas lease offers Anchorage 036561 to 036569, inclusive, in their entirety. Both decisions are substantially similar and the grounds for rejection of plaintiff's offers are stated as follows:

> The Secretary of the Interior published notice in the Federal Register on August 2, 1958 (23 F.R. 5883) concerning the agreement classifying lands for oil and gas leasing in the Kenai Moose Range. The notice states in part "Notice is hereby given that, pursuant to the regulation 43 CFR 192.9 (Circular 1990), agreement * * * has been consumated between the Bureau of Land Management and the Fish and Wildlife Service of this Department, designating those lands within the Kenai National Moose Range on the Kenai Peninsula Alaska, which are hereby closed to oil and gas leasing because such leasing would be incompatible with management thereof for wildlife purposes."

> The above referenced offer is situated within the boundaries of that area which has been closed to leasing and is hereby rejected in its entirety.

The two decisions marked chronologically EXHIBITS H and H-1 are annexed hereto and made a part of this complaint.

12. A timely appeal from the decisions of the Manager of the Anchorage land office was taken by plaintiff to the Director of the Bureau of Land Management in accordance with the Department's Rules of Practice, 43 CFR 221.2. By decision of March 25, 1959, which consolidated a number of appeals, including plaintiff's appeal, the Acting Director, Bureau of Land Management, affirmed the Manager's decisions. The Acting Director held that an applicant for a noncompetitive lease acquires no vested right to a lease by the filing of an application but only an inchoate right to receive a lease over a later applicant if the Secretary in his descretion decides to lease the land. A copy of this decision marked EXHIBIT I is annexed hereto and made a part of this complaint.

13. Thereafter, plaintiff took a timely appeal from the decision of the Acting Director, Bureau of Land Management, to the defendant Secretary of the Interior in accordance with the Department's Rules of Practice, 43 CFR 221.32. A copy of plaintiff's brief in support of the appeal is annexed hereto as EXHIBIT J and made a part of this complaint. By decision of October 30, 1961, which improperly consolidated a number of appeals, including plaintiff's appeal, the Assistant Secretary of the Interior affirmed the action of the Bureau of Land Management in rejecting plaintiff's lease offers. Among other reasons given for affirming the Bureau of Land Management the Assistant Secretary held that the agreement approved by the Secretary closing part of the Kenai National Moose Range to oil and gas leasing did not constitute a withdrawal of public lands but merely the exercise of his discretionary authority over issuing noncompetitive leases under Section 17 of the Mineral Leasing Act. The Assistant Secretary summarized the legal basis for this holding as follows:

In one form or another, most of the appellants contend that the Secretary lacks authority to withdraw from mineral leasing large areas of public lands. They assert, as a subsidiary to this argument, that in withdrawing part of the moose range from leasing the Secretary did not follow the procedure prescribed in his regulations for making withdrawals.

The short answer to these assertions is that neither in the agreement of July 24, 1958, supra, nor in the regulation pursuant to which the agreement was adopted did the Secretary purport to exercise his authority to withdraw land.
* * *

* * *

In adopting the agreement of July 24, 1958, the Secretary was simply exercising in a formal manner his discretionary authority over issuing noncompetitive leases under section 17 of the Mineral Leasing Act. Because the effect upon oil and gas applicants of the exercise of this authority is the same as a withdrawal of land, the appellants have confused the two authorities together. But the source of authority does not change because of its effect. Stripped of all authority to withdraw lands, the Secretary would still have his discretionary authority to refuse to issue leases where he thinks issuance would not be in the public interest.

A copy of this decision marked EXHIBIT K is annexed hereto and made a part of this complaint.

14. Under the Rules of Practice of the Department of the Interior, 43 CFR, Part 221, the plaintiff has exhausted the administrative remedy.

15. The action of the defendant in rejecting plaintiff's lease offers and in refusing to issue noncompetitive oil and gas leases to plaintiff as the first qualified applicant is unlawful, arbitrary, unreasonable and discriminatory, is in violation of the express and mandatory provisions of the Mineral Leasing Act of February 25, 1920, as amended, and the applicable regulations promulgated thereunder, and is contrary to the decisions, rulings and established administrative practice of the Department of the Interior. The unlawful and improper actions of the defendant herein complained of are particularized as follows:

(a) In failing to issue noncompetitive oil and gas leases to

plaintiff promptly upon receipt of plaintiff's lease offers on August 9, 1957, in strict conformity with the then applicable regulation 43 CFR 192.9, Circular 1945, although defendant accepted plaintiff's filing fees and first year lease rentals.

(b) In changing the rules in the middle of the game approximately five months after plaintiff's lease offers were filed and in applyi ng the new regulation, Circular 1990, retroactively to defeat plaintiff's rights by ultimately rejecting the lease offers.

(c) In publishing notice on August 2, 1958, almost one year after plaintiff's lease offers were filed, of an agreement between the Bureau of Land Management and Fish and Wildlife Service, which defendant approved on July 24, 1958, closing to oil and gas leasing approximately half the area of the Kenai National Moose Range including the land in suit.

(d) In closing to oil and gas leasing approximately half the area of the Kenai National Moose Range, including the land in suit, in violation of the plain mandate of Section 1 of the Mineral Leasing Act of February 25, 1920, as amended (30 U.S.C. 181), which declares that all deposits of oil and gas and lands containing such deposits owned by the United States shall be subject to leasing under the Act except "lands acquired under the Appalachian Forest Act, and those in incorporated cities, towns, and villages and in national parks and monuments, those acquired under other Acts subsequent to February 25, 1920, and lands within the naval petroleum and oilshale reserves." The land in suit does not fall within these exceptions.

WHEREFORE Plaintiff prays:

1. That the Court review the action of the defendant in accordance with the provisions of Section 10 of the Administrative Procedure Act (5 U.S.C. 1009).

2. That it be declared and adjudged that defendant violated the provisions of the Mineral Leasing Act of February 25, 1920, as amended (30 U.S.C. 181 et seq.) in closing to oil and gas leasing approximately

half the area of the Kenai National Moose Range, including the land in suit, as specifically described in the defendant's notice of July 24, 1958, published in the Federal Register of August 2, 1958.

3. That it be declared and adjudged that defendant's amendment of regulation 43 CFR 192.9 on January 8, 1958 (Circular 1990), may not be applied retroactively so as to defeat plaintiff's lease offers Anchorage 036561 to 036569 inclusive which were filed on August 9, 1957, pursuant to the then existing regulation 43 CFR 192.9 approved December 8, 1955 (Circular 1945).

4. That it be declared and adjudged that defendant violated Section 17 of the Mineral Leasing Act of February 25, 1920, as amended (30 U.S.C., 1958 ed., sec. 226), in rejecting plaintiff's lease offers Anchorage 036561 to 036569 inclusive.

5. That the defendant be directed to reinstate plaintiff's lease offers Anchorage 036561 to 036569 inclusive and to issue noncompetitive oil and gas leases to plaintiff as the first qualified applicant if his lease offers are otherwise regular and complete.

6. That defendant pay to plaintiff the costs of this action.

7. That plaintiff have such other and further relief as is just and equitable.

/s/ MAX BARASH
711 - 14th Street, N.W.
Washington 5, D.C.
(Executive 3-6666)

Attorney for Plaintiff

DISTRICT OF COLUMBIA: SS

Max Barash, being first duly sworn, deposes and says that he is the attorney for the plaintiff herein, that the plaintiff is a resident of Big Lake, Texas, and is absent from the District of Columbia, that affiant read the foregoing complaint by him subscribed and that he knows the contents thereof and that the matters and things therein stated he verily believes to be true.

/s/ MAX BARASH

[Jurat dated January 25, 1962]

APPENDIX A

DESCRIPTION OF LAND IN SUIT

Serial Number	Lands Applied for - All Unsurveyed	Amount of Acreage	Rental Paid
Anchorage 036561	T. 2 S., R. 9 W. Seward Meridian Sections 35 and 36	1280	$320.00
" 036562	T. 2 S., R. 9 W. " Sections 29, 32, 33 and 34	2560	$640.00
" 036563	T. 2 S., R. 9 W. " Sections 24, 26, 27 and 28	2560	$640.00
" 036564	T. 2 S., R. 9 W. " Sections 20, 21, 22 and 23	2560	$640.00
" 036565	T. 2 S., R. 9 W. " Sections 14, 15, 16 and 17	2560	$640.00
" 036566	T. 2 S., R. 9 W. " Sections 8, 9, 10 and 11	2560	$640.00
" 036567	T. 2 S., R. 9 W. " Sections 2, 3, 4 and 5	2560	$640.00
" 036568	T. 1 S., R. 9 W. " Sections 34 and 35	1280	$320.00
" 036569	T. 1 S., R. 9 W. " Sections 23, 26, 32 and 33	2560	$640.00

EXHIBIT A

TITLE 43—PUBLIC LANDS: INTERIOR

Chapter I—Bureau of Land Management, Department of the Interior

[Circular 1945]

PART 192—OIL AND GAS LEASES

LEASING OF WILDLIFE REFUGE LANDS

Section 192.9 is amended to read as follows:

§ 192.9 *Leasing of wildlife refuge lands.* (a) Geological and geophysical prospecting permits may be issued by the Fish and Wildlife Service on areas subject to its jurisdiction prior to leasing under such terms and conditions as that Service may prescribe.

(b) (1) Areas determined to be indispensable for the preservation of rare or endangered species, remnant big-game herds, and irreplaceable examples of unique animal or plant ecology are not available for leasing. Areas in this category at present are included in Appendix A. Oil and gas leases may be issued for other lands administered by the Fish and Wildlife Service for wildlife conservation, except that; on those areas designated by the Fish and Wildlife Service as wilderness, recreational, water development, or marsh, with respect to which the Fish and Wildlife Service reports that oil and gas development might seriously impair or destroy the usefulness of the lands for wildlife conservation purposes, no leases will be issued unless a complete and detailed operating program for the area, which will insure full protection of the particular values for which established, is approved by the Director, Fish and Wildlife Service. All pending applications on such excepted wilderness, recreational, water development, and marsh areas will be rejected unless within 6 months the applicant files an operating program sufficient to accomplish these purposes. Areas in this category are listed in Appendix B.

(2) The following conditions shall be expressed in any lease issued under this section:

(i) Geological and geophysical prospecting conducted on the leased premises shall be of a type and at a time satisfactory to the Fish and Wildlife Service.

(ii) No drilling operations shall be conducted under the lease until such lease has been committed to an approved unit plan. However, the Secretary may, in his discretion, permit or require drilling if he determines that a unit plan including the leased area cannot be secured and that drilling is necessary to protect the interests of the United States.

(a) A unit agreement which includes lands administered for wildlife conservation shall contain a provision that no drilling operations may be conducted on the unitized portion of the Government-leased lands administered for wildlife conservation without the consent and approval of the Fish and Wildlife Service as to the time, place, and nature of such operations.

(b) In every instance, a plan of development which includes lands administered for wildlife conservation shall not be approved without the concurrence of the Fish and Wildlife Service.

(iii) Lessees shall observe and comply with all State and Federal laws and regulations relating to wildlife and shall take such action as is necessary to assure observance and compliance with these laws and regulations by lessees, employees and agents.

(Sec. 32, 41 Stat. 450; 30 U. S. C. 189)

DOUGLAS MCKAY,
Secretary of the Interior.

APPENDIX A—FISH AND WILDLIFE SERVICE LANDS NOT AVAILABLE FOR LEASING

Alaska:
Certain of the Aleutian Islands.
Georgia:
Okefenokee.
Hawaii: [1]
Certain of the Hawaiian Islands
Maryland:
Patuxent.
Montana:
National Bison Range.
Red Rock Lakes.
Nebraska:
Fort Niobrara.
North Dakota:
Sullys Hill.
Oklahoma:
Wichita Mountains.
Texas:
Aransas.
Santa Ana.
Wyoming:
National Elk.

[1] The regulations in 43 CFR, Part 192 do not apply to the Territory of Hawaii.

APPENDIX B—FISH AND WILDLIFE SERVICE LANDS AVAILABLE FOR LEASING UNDER A SATISFACTORY DEVELOPMENT AND OPERATING PLAN

Alabama:
Petit Bois (see also Mississippi).
Wheeler.
Alaska:
Chamisso.
Hazen Bay.
Hazy Island.
Kenai: The following areas and all lands within one mile of Tustumena Lake, Skilak Lake, Kenai River, Upper and Lower Russian Lake and River, Hidden Lake, Kasilof River, and Chickaloon Flats.
Pribilof Islands.
St. Lazaria.
Semidi.
Arizona:
Cabeza Prieta Game Range.
Havasu Lake (see also California).
Imperial (see also California).
Kofa Game Range: All Range lands in T. 1 N., Rs. 15–18 W.; T. 2 N., Rs. 16 & 17 W.; T. 1 S., Rs. 15–18 W.; T. 2 S., Rs. 15–19 W.; T 3 S. Rs 15, 16, & 19 W.; T. 4 S., R. 17 West ½; T. 5 S., Rs. 17 & 18 W.; T. 6 S., R. 18 W.
Arkansas:
Big Lake.
White River.
California:
Clear Lake.
Colusa.
Farallon.
Havasu Lake (see also Arizona).
Imperial (see also Arizona).
Lower Klamath (see also Oregon).
Sacramento.
Salton Sea.
Sutter.
Tule Lake.
Colorado:
Monte Vista.
Delaware:
Bombay Hook.
Killcohook (see also New Jersey).
Florida:
Andoite.
Brevard.
Cedar Keys.
Chassahowitzka.
Chinsegut.
Great White Heron.
Key West.
Lonabatchee.
Passage Key.
Pelican Island.
Pinellas.
Sanibel.
St. Marks: All refuge lands in Tr. 4 and 5 S., Rs. 1, 2, and 3 E., T. M., and refuge lands in the Bartsfield Survey.

Published in 20 F. R. December 8, 1955

Copies to	Each AA	25	BFS	10	
	Each SO	10	ESO	10	
	Each LO	25	Wash. Staff Officers		5 each
	Each DFO	5	Asso. Solicitor Parriott		30
	Each DGO	5	Miss Williams GS Room 3219		20
All Regional and Field Solicitors 1 ea.			Mrs. Jean Wright Room 6126		1

Georgia:
Blackbeard Island.
Savannah (see also South Carolina).
Tybee.
Wolf Island.
Idaho:
Camas.
Deer Flat.
Minidoka.
Snake River.
Illinois:
Chautauqua.
Crab Orchard.
Lands made available by the Corps of Engineers on the Mississippi River between Rock Island and Alton, Illinois (see also Iowa and Missouri).
Upper Mississippi River Wild Life and Fish Refuge (see also Iowa, Minnesota, and Wisconsin).
Iowa:
Lands made available by the Corps of Engineers on the Mississippi River between Rock Island and Alton, Illinois (see also Illinois and Missouri).
Union Slough.
Upper Mississippi River Wild Life and Fish Refuge (see also Illinois, Minnesota, and Wisconsin).
Kansas:
Kirwin Wildlife Management Area.
Kentucky:
Kentucky Woodlands.
Louisiana:
Lacassine.
Shell Keys.
Maine:
Widow's Island.
Maryland:
Blackwater.
Chincoteague (see also Virginia).
Glenn Martin.
Massachusetts:
Great Meadows.
Monomoy.
Parker River.
Michigan:
Huron.
Michigan Islands.
Seney.
Shiawassee.
Minnesota:
Beltrami Wildlife Management Area.
Mille Lacs.
Mud Lake.
Rice Lake.
Tamarac.
Talcot.
Upper Mississippi River Wild Life and Fish Refuge (see also Illinois, Iowa, and Wisconsin).
Mississippi:
Noxubee: All refuge lands in the following subdivisions: T. 17 N., R. 13 E., secs. 13, 14, 23, 24, 25, 26, and 36; T. 16 N., R. 14 E., secs. 1–4, 9–15, and 21–24; T. 17 N., R. 14 E., secs. 31–36; T. 16 N., R. 15 E., secs. 4–8 and 16–21.
Petit Bois (see also Alabama).
Missouri:
Mingo.
Lands made available by the Corps of Engineers on the Mississippi River between Rock Island and Alton, Illinois.
Missouri Wildlife Management Area.
Squaw Creek.
Swan Lake.
Montana:
Benton Lake.
Bowdoin.
Medicine Lake: All refuge lands in the following subdivisions: T. 30 N., R. 55 E., all; T. 31 N., Rs. 55 and 56 E., all; T. 31 N., R. 57 E., secs. 3–7, inclusive, all; Sec. 8, N½ and SW¼; Sec. 9, W½ NW¼; Sec. 16, N½NE¼, NW¼, N½ SW¼; T. 32 N., Rs. 56, 56, 57, 58 E., all.
Nine-Pipe.
Pablo.
Pishkun.
Willow Creek.
Nebraska:
Crescent Lake: All refuge lands in the following subdivisions: T. 20 N., R. 44 W., secs. 2–7, inclusive, 9, 10, 11, and 18, all; T. 21 N., Rs. 44 and 45 W., all.
North Platte.
Valentine: All refuge lands in the following subdivisions: T. 28 N., R. 27 W., secs. 3–5, inclusive; T. 28 N., R. 26 W., secs. 1 and 12; Ts. 29 and 30 N., Rs. 27 '28, and 29 W., all.
Nevada:
Anaho Island.
Desert Game Refuge: All Range lands in the following subdivisions: Ts. 9–14 S., Rs. 54–62 E., all; T. 15 S., Rs. 56–62 E., all; T. 16 S., Rs. 56, 57, and 58 E., Secs. 1–6, inclusive; Ts. 16 and 17 S., Rs. 59–62 E., inclusive, all; T. 18 S., Rs. 60, 61, and 62 E., all; also all lands above 6,000' elevation in the following area: T. 17 S., Rs. 54 and 55 E.; Ts. 18 and 19 S., Rs. 54, 55, and 56 E.; T. 20 S., Rs. 55, 56, 57, and 58 E.; T. 21 S., Rs. 56, 57, and 58 E.
Sheldon National Antelope Refuge.
Stillwater National Wildlife Management Area.
Stillwater National Wildlife Refuge.
New Jersey:
Brigantine.
Killcohook (see also Delaware).
New Mexico:
Bitter Lake: All of the lands of the refuge west of the Pecos River in the following area: T. 9 S., R. 25 E., secs. 14, 18, 21, 22, 23, 26, 27, 28, 32, 33, 34, and 35; T. 10 S., R. 25 E., secs. 3, 4, 5, 8, 9, 10, 11, 14, 15, 16, 20, 21, 22, 28, and 29.
Bosque del Apache: All refuge lands between the East Side Road and the proposed right-of-way for U. S. Highway No. 85.
New York:
Montezuma.
New York Wildlife Management Area.
Elizabeth Tilton.
Wertheim.
North Carolina:
Mattamuskeet.
Pea Island.
Swanquarter.
North Dakota:
Ardoch.
Arrowwood.
Chase Lake.
Des Lacs.
Lake Ilo.
Kelly's Slough.
Lake Zahl.
Long Lake.
Lostwood.
Lower Souris: All refuge lands north of the line common to Townships 158 and 159 North.
Slade.
Stump Lake.
Tewaukon.
Theodore Roosevelt.
Upper Souris.
Ohio:
West Sister Island.
Oklahoma:
Salt Plains.
Oregon:
Cape Meares.
Cold Springs.
Lower Klamath (see also California).
Malheur.
McKay Creek.
Oregon Islands.
Three Arch Rocks.
Upper Klamath.
Puerto Rico:[1]
Culebra.
South Carolina:
Cape Romain.
Santee.
Savannah (see also Georgia).
South Dakota:
Bear Buttes.
Belle Fourche.
Lacreek.
Lake Andes.
Sand Lake.
Waubay.
Tennessee:
Lake Isom.
Reelfoot.
Tennessee.
Texas:
Laguna Atascosa.
Muleshoe.
Utah:
Bear River Migratory Bird Refuge.
Locomotive Springs.
Vermont:
Missisquoi.
Virginia:
Back Bay.
Chincoteague (see also Maryland).
Presquile.
Washington:
Columbia.
Copalis.
Dungeness.
Flattery Rocks.
Jones Island.
Lenore Lake.
Matia Island.
Quillayute Needles.
Smith Island.
Turnbull.
Skagit.
Willapa.
Wisconsin:
Gravel Island.
Green Bay.
Horicon.
Long Tail Point.
Necedah.
Necedah Wildlife Management Area.
Upper Mississippi River Wild Life and Fish Refuge (see also Iowa, Illinois, and Minnesota).
Wyoming:
Hutton Lake.
Pathfinder: All refuge lands in Townships 29 and 30 N., R. 85 W.

[F. R. Doc. 58-9852; Filed, Dec. 7, 1958; 8:45 a. m.]

[1] The regulations in 43 CFR Part 28 do not apply to Puerto Rico.

INT.-DUP. SEC., WASH., D.C.

EXHIBIT B

August 21, 1957

The U.S. Dept. of the Interior,
Bureau of Land Management,
Anchorage, Alaska.

REFERENCE OUR OIL LEASE FILINGS ANCHORAGE NUMBERS 036561 TO 036569 INCLUSIVE WE NOTICE OUR CHECKS COVERING THESE APPLICATIONS HAVE CLEARED BANK AND WE WOULD VERY MUCH APPRECIATE YOUR ADVISING US BY WESTERN UNION COLLECT IF THIS MEANS WE WILL BE AWARDED ACREAGE. IF NOT COULD YOU TELL US APPROXIMATE TIME WE MAY EXPECT TO LEARN IF WE ARE SUCCESSFUL IN SECURING THIS ACREAGE THANK YOU

/s/ Bert F. Duesing

Prepaid
Night Letter

EXHIBIT C

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
Land Office
Anchorage, Alaska

Anchorage
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Dated: August 26, 1957

Mr. Bert F. Duesing
Big Lake, Texas

Dear Mr. Duesing:

In reference to your telegram received August 22, 1957, we wish to inform you that the acceptance of the checks covering the filing fee and rentals of the lease offers does not necessarily mean that the offers will be subsequently issued.

The issuance of leases is dependent upon the terms and provisions of the Mineral Leasing Act of February 25, 1920 (41 Stat. 437, 30 U.S.C. 181), as amended. Section 17 of this Act provides in pertinent part:

> "* * * When the lands to be leased are not within any known structure of a producing oil or gas field, the person first making application for the lease who is qualified to hold a lease * * * shall be entitled to a lease of such lands * * *."

Therefore, it is mandatory for this office to process the offers in sequence, and in so doing, it will be several months before such time arrives for the subject cases to reach the process of adjudication. At that time, if it is found that the applications are valid in all respects, that there are no intervening claims to the land and the above referenced offers are the first qualified applications, a lease will be then authorized for the lands in question.

Please be advised that we will do all we can and as quickly and efficiently as is entirely possible to process your offers expeditiously.

Yours very truly

/s/ Virgil O. Seiser
Manager

EXHIBIT D

Circular No. 1990

UNITED STATES
DEPARTMENT OF THE INTERIOR
Washington

CODE OF FEDERAL REGULATIONS TITLE 43--PUBLIC LANDS: INTERIOR CHAPTER I--BUREAU OF LAND MANAGEMENT

PART 192--OIL AND GAS LEASES

Section 192.9 is revised as follows:

192.9. Leasing of wildlife refuge lands, game range lands and coordination lands.

(a) Definitions. (1) Wildlife refuge lands. Such lands are those embraced in a withdrawal of public domain and acquired lands of the United States for the protection of all species of wildlife within a particular area. Sole and complete jurisdiction over such lands for wildlife conservation purposes is vested in the United States Fish and Wildlife Service even though such lands may be subject to prior rights for other public purposes or, by the terms of the withdrawal order, may be subject to mineral leasing.

(2) Game range lands. Game ranges created by a withdrawal of public lands and reserved for dual purposes, namely protection and improvement of the public grazing lands and natural forage resources and conservation and development of natural wildlife resources, are under the joint jurisdiction of the Bureau of Land Management and the United States Fish and Wildlife Service.

(3) Coordination lands. These lands are withdrawn or acquired by the Government and made available to the States by cooperative agreements entered into between the United States Fish and Wildlife Service and the game commissions of the various States, in accordance with the Act of March 10, 1934 (48 Stat. 401), as amended by the Act of August 14, 1946 (60 Stat. 1080), or by long-term leases or agreements between the Department of Agriculture and the game commissions of the various States pursuant to the Bankhead-Jones Farm Tenant Act (50 Stat. 525), as amended, where such lands were subsequently transferred to the Department of the Interior, with the United States Fish and Wildlife Service as the custodial agency of the Government.

(4) Alaska Wildlife Areas. Such lands are areas in Alaska created by a withdrawal of public lands for the management of natural wildlife resources and administered by the United States Fish and Wildlife Service.

(b) Leasing policy and procedure. (1) No offers for oil and gas leases covering wildlife refuge lands will be accepted and no leases covering such lands will be issued except as provided in subparagraph (b)(2) below.

(2) In instances where it is determined by the Geological Survey that any of the lands mentioned in subparagraphs (a)(1), or any of the lands mentioned in subparagraphs (a)(2), (a)(3), and (a)(4) and defined in this section as not available for leasing are subject to drainage, the Bureau of Land Management, with the concurrence of the United States Fish and Wildlife Service, will process an offering inviting competitive bids in accordance with the then existing regulations relating to competitive oil and gas leasing. Such leases shall be issued only upon approval by the Secretary of the Interior and shall contain such stipulations as are necessary to assure that leasing activities and drilling shall be carried out in such a manner as will result in a minimum of damage to wildlife resources.

(3) As to game range lands and Alaska wildlife areas, representatives of the appropriate office of the Bureau of Land Management and the United States Fish and Wildlife Service will confer for the purpose of entering into an agreement specifying those lands which shall not be subject to oil and gas leasing. No such agreement shall become effective, however, until approved by the Secretary of the Interior. As to coordination lands, representatives of the Bureau of Land Management and the United States Fish and Wildlife Service will, in cooperation with the authorized members of the various State game commissions, confer for the purpose of determining by agreement those lands which shall not be subject to oil and gas leasing.

(4) The remaining lands in (a)(2) and (a)(4) not closed to oil and gas leasing will be subject to leasing on the imposition of such stipulations agreed upon by the Fish and Wildlife Service and the Bureau of Land Management. The remaining lands in (a)(3) not closed to oil and gas leasing will be subject to leasing on the imposition of such stipulations agreed upon by the State Game Commission, the United States Fish and Wildlife Service and the Bureau of Land Management.

(c) Publication and filing of agreements; filing of lease offers. The agreements referred to in subparagraph (b)(3), above, shall be published in the Federal Register and shall contain a description of the

lands affected thereby which are not subject to oil and gas leasing, together with a statement of the stipulations agreed upon by the parties thereto for inclusion in such leases to assure that all operations under the lease shall be carried out in such a manner as will result in a minimum of damage to wildlife resources. The agreements, as supplemented by maps or plats specifically delineating the lands will be filed in the appropriate land offices of the Bureau of Land Management where they may be inspected by the public at the usual hours specified for that purpose. Lease offers for such lands will not be accepted for filing until the tenth day after the agreements and supplemental maps or plats are noted on the land office records.

(d) Suspension of pending applications. All pending offers or applications heretofore filed for oil and gas leases covering game ranges, coordination lands, and Alaska wildlife areas, will continue to be suspended until the agreements referred to in subparagraph (b)(3), above, shall have been completed.

(e) Lands in requested withdrawal. All existing offers or applications for oil and gas leases covering lands included in requests for withdrawals for wildlife refuges, game ranges, coordination lands or Alaska wildlife areas, as defined herein, shall be suspended until after the consummation of the withdrawal, and thereafter such offers shall be considered in accordance with the provisions of this section.

/s/ Fred A. Seaton
Secretary of the Interior

January 8, 1958

Filed in Federal Register January 10, 1958

American Mail Line dock in trucks owned by Boeing. These shipments will be accompanied by a member of the Boeing Industrial Hygiene Unit who will be responsible for radiation protection during such transit.

3. *Packaging of Waste.* The radioactive waste will be packaged by the Boeing Airplane Company. The package will consist of a primary or inner container, a secondary or outer container and a concrete filler. The primary container will be metal with a tight fitting cover. Dry wastes will be compressed and a filler will be added when necessary to eliminate voids. Liquid waste will be neutralized and mixed with plaster of paris or cement to form a solid homogenous mass within the container. Non-aqueous liquids will be mixed with earth or absorbent clay. The primary container will be sealed with masking tape. The density of the primary container will be sufficient to insure it will not float if it becomes separated from the waste package. Each primary container will be monitored for radioactive contamination and any detectable contamination removed prior to packaging. The outer container will be a standard 55 gallon steel drum. Concrete with a minimum density of 135 lbs./cu. ft. will be used as the filler. The outer container will be capped with a dome of concrete. The completed waste package will have a minimum density of 10 lbs./gal. to insure sinking. Sufficient shielding will be provided so that the radiation level will be less than 10 mr/hr at the surface of the container and less than 1 mr/hr at one meter from the surface. The proposed waste package will meet the recommendations of the National Committee on Radiation Protection as contained in NBS Handbook 58 "Radioactive Waste Disposal in the Ocean" and will meet the labeling requirements of Part 20 of the Code of Federal Regulations "Standards for Protection Against Radiation".

4. *Records.* American Mail Line, Ltd., will maintain records of the time, date, and location of the disposal site to the nearest minute of latitude and longitude. The Boeing Airplane Company will maintain records of the contents of each waste package.

5. *Disposal Site.* The disposal site will be in the Pacific Ocean at least 150 miles from the continental shelf at a minimum depth of 1,000 fathoms. At least 10 days prior to each disposal event the Atomic Energy Commission will be notified of the proposed date of disposal, the proposed disposal location in latitude and longitude, the total number of containers, the total activity in millicuries and the most hazardous radioisotope in each container.

Conclusion: The disposal of the types and levels of radioactive waste specified in the application in the ocean at a depth of 1,000 fathoms when packaged in such a manner as to provide reasonable assurance that the material reaches the bottom is considered to be a safe method of radioactive waste disposal. These amounts of radioactive material, if released into sea water and diluted with the available dilution media at the specified depth are highly unlikely to exceed, and in all probability will be less than, the permissible concentrations for drinking water in unrestricted areas as specified in Part 20 "Standards for Protection Against Radiation".

Dated: July 25, 1958.

For the Division of Licensing and Regulation.

H. L. PRICE,
Director.

[F. R. Doc. 58-5911; Filed, Aug. 1, 1958; 8:45 a. m.]

DEPARTMENT OF THE INTERIOR

Office of the Secretary

KENAI NATIONAL MOOSE RANGE, ALASKA

AGREEMENT CLASSIFYING LANDS FOR OIL AND GAS LEASING PURPOSES

Notice is hereby given that, pursuant to the regulation 43 CFR, 192.9 (Circular 1990), agreement, as reflected by the map herein referred to, has been consumated between the Bureau of Land Management and the United States Fish and Wildlife Service of this Department, designating those lands within the Kenai National Moose Range on the Kenai Peninsula, Alaska, which are hereby closed to oil and gas leasing because such activities would be incompatible with management thereof for wildlife purposes. The lands excluded from leasing are specifically delineated on the map of the Kenai National Moose Range, set forth below, which was approved on January 29, 1958, and are identified on said map as follows:

Closed area. The following described lands within the boundaries of the Kenai National Moose Range, Alaska, are not opened to oil and gas leasing:

SEWARD MERIDIAN

Ts. 1, 2, and 3 N., R. 3 W. (Unsurveyed)
Portion in Moose Range.
Ts. 1 and 2 N., R. 4 W. (Unsurveyed)
All.
Ts. 3 and 4 N., R. 4 W. (Unsurveyed)
Portion in Moose Range.
T. 5 N., R. 4 W. (Unsurveyed)
Portion in Moose Range, south of Sterling Highway as relocated.
T. 9 N., R. 4 W. (Unsurveyed)
North tier of secs. in Moose Range.
T. 10 N., R. 4 W. (Unsurveyed)
Portion in Moose Range.
Ts. 1, 2, 3, and 4 N., R. 5 W. (Unsurveyed)
All.
T. 5 N., R. 5 W. (Unsurveyed)
Portion in Moose Range, south of Sterling Highway as relocated.
T. 9 N., R. 5 W. (Unsurveyed)
Secs. 1 to 6.
T. 10 N., R. 5 W. (Unsurveyed)
Portion in Moose Range.
Ts. 1, 2, 3, and 4 N., R. 6 W. (Unsurveyed)
All.
T. 5 N., R. 6 W. (Unsurveyed)
Portion in Moose Range, south of Sterling Highway as relocated.
T. 10 N., R. 6 W. (Unsurveyed)
East range of secs. in Moose Range.
Ts. 1, 2, 3, and 4 N., R. 7 W. (Unsurveyed)
All.
T. 5 N., R 7 W. (Unsurveyed)
Portion in Moose Range, south of Sterling Highway as relocated.
Ts. 1, 2, 3, and 4 N., R. 8 W. (Unsurveyed)
All.
T. 1 and 2 N., R. 9 W. (Unsurveyed)
All.
T. 3 N., R. 9 W. (Unsurveyed)
Secs. 31 to 36, Incl.
T. 1 N., R. 10 W. (Unsurveyed)
Secs. 1 to 6; Secs. 8 to 16; Secs. 22 to 27; and Secs. 34 to 36.
T. 2 N., R. 10 W. (Unsurveyed)
All.
T. 3 N., R. 10 W. (Unsurveyed)
Secs. 31 to 36, incl.
T. 1 N., R. 11 W. (Unsurveyed)
Secs. 1, 2, and 3.
T. 2 N., R. 11 W. (Partly unsurveyed)
Portion in Moose Range.
T. 3 N., R. 11 W. (Partly unsurveyed)
Secs. 34, 35, and 36; and E½, E½W½ Sec. 33.
Ts. 1 and 2 S., R. 3 W. (Unsurveyed)
Portion in Moose Range.
T. 1 S., R. 4 W. (Unsurveyed)
All.
T. 2 S., R. 4 W. (Unsurveyed)
Portion in Moose Range.
T. 1 S., R. 5 W. (Unsurveyed)
All.
Ts. 1 and 2 S., R. 6 W. (Unsurveyed)
All.
Ts. 3, 4, and 5 S., R. 6 W. (Unsurveyed)
Portion in Moose Range.
Ts. 1, 2, and 3 S., R. 7 W. (Unsurveyed)
All.
Ts. 4 and 5 S., R. 7 W. (Unsurveyed)
Portion in Moose Range.
Ts. 1, 2, and 3 S., R 8 W. (Unsurveyed)
All.
T. 4 S., R. 8 W. (Unsurveyed)
Portion in Moose Range.
T. 1 S., R. 9 W. (Unsurveyed)
All.
Ts. 2, 3, and 4 S., R. 9 W. (Unsurveyed)
Portion in Moose Range.
T. 1 S., R. 10 W. (Unsurveyed)
Secs. 1 to 4; Secs. 9 to 15; and Secs. 24, 25, and 36.
T. 2 S., R. 10 W. (Unsurveyed)
Secs. 1, 12, 13, 24, 25, and 36.

The balance of the lands within the Kenai National Moose Range are subject to the filing of oil and gas lease offers in accordance with the provisions of the Mineral Leasing Act of 1920, as amended (41 Stat. 437) and the regulations in 43 CFR, Part 192 and the provisions hereof. Offers to lease covering any of these lands which have been pending and upon which action was suspended in accordance with the regulation 43 CFR 192.9 (d) will now be acted upon and adjudicated in accordance with the regulations.

All offers to lease must be submitted on Form 4–1158 and in accordance with the regulation 43 CFR 192.42, accompanied by a $10 filing fee and the advance first year's rental of 50 cents per acre in accordance with the provisions of Public Law 85–505 enacted July 3, 1958.

In accordance with the regulation 43 CFR 192,9 (Circular 1990), lease offers for lands which have not been excluded from leasing will not be accepted for filing until the tenth day after the agreement and map are noted on the records of the land office of the Bureau of Land Management in Anchorage, Alaska. All lease offers filed in that office on that day and until 10 a. m., on the tenth day thereafter will be treated as having been filed simultaneously. The priorities of all offers which conflict in whole or in part will be determined in accordance with the procedure outlined in the regulation 43 CFR 295.8.

All leases will be subject to the special stipulations (Form 4–1383) approved April 18, 1958 and published in the FEDERAL REGISTER April 22, 1958 (23 F. R. 2636, 2637).

FRED A. SEATON,
Secretary of the Interior.

JULY 24, 1958.

EXHIBIT G

DEPARTMENT OF THE INTERIOR
INFORMATION SERVICE

STATEMENT BY SECRETARY OF THE INTERIOR FRED A. SEATON ON OIL AND GAS LEASING ON THE KENAI MOOSE RANGE, ALASKA, JANUARY 29, 1958.

I have approved this week a classification of the Kenai Moose Range in the Territory of Alaska which delineates those areas which will be opened and closed to development. The closed section -- about 1,689 square miles -- includes all areas on which the Fish and Wildlife Service believes oil and gas development would be incompatible with wildlife management purposes.

In those areas of the Kenai Moose Range open to oil and gas leasing -- about 1,525 square miles -- operations will be subject to stipulations which provide maximum protection for fish and wildlife.

The lands open to leasing lie primarily north of the Sterling Highway and include the current oil-producing area and two proposed new unit areas. Also included in the open areas will be the Swanson River Valley, lands around the towns of Kenai and Kasilof, and the Soldonata area. All good spawning and rearing areas for salmon will be protected, and important waterfowl areas will be preserved. Also, because of its scenic beauty, an area at Bedlam Lake will be closed.

I am assured by Assistant Secretary Leffler that this action opening a portion of the Kenai range subject to the proposed regulated development is entirely consistent with the primary purpose for which the range is managed.

A map showing the locations of the open and closed areas is attached.

As of today no classifications of other areas have been completed. The Fish and Wildlife Service, the Bureau of Land Management and the Geological Survey, as I advised you at our last press conference, are proceeding as rapidly as possible on classification procedures for the

other wildlife lands.

When the classification procedures have been completed and approved, they will be sent to the field personnel of the Fish and Wildlife Service, the Bureau of Land Management, and the Geological Survey. We will seek a speedy, but thorough, classification. It will be made initially by employees who know land and wildlife values, assisted by technicians who can judge properly the possibility of mineral occurrences. The final decision in all classifications, of course, rests with the Secretary of the Interior.

EXHIBIT H

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

Land Office
131 5th Avenue
Anchorage, Alaska

ALO:M5

August 13, 1958

Certified Mail
Return Receipt Requested

DECISION

Bert F. Duesing Box 244 Big Lake, Texas	)))	Anchorage	036561 - 036565, Inc.

Offer Rejected in its Entirety

The above referenced offeror submitted an offer to lease for oil and gas pursuant and subject to the terms of the Mineral Leasing Act of 1920, (41 Stat. 437, 30 U.S.C. Sec. 181), as amended, for certain lands within the Kenai National Moose Reserve.

The Secretary of the Interior published notice in the Federal Register on August 2, 1958 (23 F.R. 5883) concerning the agreement classifying lands for oil and gas leasing in the Kenai Moose Reserve. The notice

states in part "Notice is hereby given that, pursuant to the regulation 43 CFR 192.9 (Circular 1990), agreement * * * has been consumated between the Bureau of Land Management and the Fish and Wildlife Service of this Department, designating those lands within the Kenai National Moose Range on the Kenai Peninsula Alaska, which are hereby closed to oil and gas leasing because such leasing would be incompatible with management thereof for wildlife purposes."

The above referenced offer is situated within the boundaries of that area which has been closed to leasing and is hereby rejected in its entirety.

The right of appeal to the Director, Bureau of Land Management is allowed in accordance with information in enclosed Form 4-1366 made a part hereof. An appeal filed in accordance with the regulations in attached Form 4-1364 will be properly filed. Latest amendments to the applicable regulations are contained in Circular No. 1997, 23 F.R. 1929 (March 22, 1958).

/s/ Irving W. Anderson
Manager

* * *

EXHIBIT H-1

Exhibit H-1 is identical to Exhibit H - as appears on page 20, except date of decision is August 20, 1958, and the lease offers rejected are Anchorage 036566 to 036569 inclusive.

EXHIBIT I

OIL AND GAS) 9 Lands Subject to Leasing
) 10 Lease Offers

An applicant for a noncompetitive lease acquires no vested right to a lease by the filing of an application but only an inchoate right to receive a lease over a later applicant, if the Secretary in his discretion decides to lease the land.

The granting of oil and gas leases on Federal lands is a matter within the discretion of the Secretary of the Interior. Where the Secretary has designated certain lands within the Kenai National Moose Range in Alaska closed to oil and gas leasing because such leasing would be incompatible with management thereof for wildlife purposes, oil and gas lease offers for such lands were properly rejected.

Richard K. Todd et al., Anchorage 026746, etc.
(March 25, 1959)

In reply refer to:
Anchorage 026746, etc.
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR

Bureau of Land Management
Washington 25, D. C.

Certified Mail
Return Receipt Requested

March 25, 1959

DECISION

Richard K. Todd et al.[1/]) Oil and Gas

Manager's Decisions Affirmed

Mr. Todd et al. have appealed from decisions of the Manager which rejected their respective oil and gas lease offers [2/] as to lands within the boundaries of that area in the Kenai National Moose Range which was

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[1/] See next page.

[2/] See next page.

closed to leasing.[3/] The decisions stated the Secretary of the Interior published notice in the Federal Register on August 2, 1958 (23 F.R. 5883) concerning an agreement classifying lands for oil and gas leasing in the Kenai Moose Range. The Manager stated the notice states in part, "Notice is hereby given that, pursuant to the regulation 43 CFR 192.9 (Circular 1990), agreement * * * has been consummated between the Bureau of Land Management and the Fish and Wildlife Service of this Department, designating those lands within the Kenai National Moose Range on the Kenai Peninsula, Alaska, which are hereby closed to oil and gas leasing because such leasing would be incompatible with management thereof for wildlife purposes."

The appellants do not dispute that the lands in question lie within the area closed to leasing under the notice referred to. In substance each appellant contends that he has a statutory preference right to an oil and gas lease on the lands applied for because his offer was filed prior to the closing of the lands to oil and gas leasing.

The records verify the status of the lands as reported by the Manager in his decisions.

The Department has consistently held that an applicant for a non-competitive lease acquires no vested right to a lease by the filing of an application but only an inchoate right to receive a lease over a later applicant, if the Secretary in his discretion decides to lease the land.

1/ See attached appendix for names and addresses of appellants, serial numbers of their lease offers, the dates these were filed and the dates of the Manager's decisions. Proposed assignees under some of the lease offers have joined with the appellants in presenting the appeals. Proposed assignees have no interest to maintain an appeal but they will be treated as amicus curiae to the extent that copies of this decision will be sent to them.

2/ Filed pursuant to the Mineral Leasing Act, as amended (30 U.S.C., 1952 ed., sec. 226).

3/ In his decision in Anchorage 028598 the Manager erroneously rejected the offer as to secs. 33 and 34 because they "are situated within the boundaries of Executive Order #8979." The offer should have been rejected as to these lands because they are within the closed area of the Kenai National Moose Range.

See United Manufacturing Company et al., 65 I.D. 106 (March 5, 1958), and cases cited therein, particularly the court decisions mentioned, revealing the courts have repeatedly held that the issuance of an oil and gas lease under section 17 of the Mineral Leasing Act, as amended, supra, is a matter within the discretion of the Secretary. See in this connection also Solicitor's Opinion M-36519, 65 I.D. 305 (July 15, 1958).

The Secretary having determined in his discretion that the subject lands are not available for oil and gas leasing, the applications were properly rejected.

The appellants are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

/s/ Earl J. Thomas
Acting Director

Enclosure

APPENDIX

[Pages 1 to 10 and 13 and 14 of Appendix omitted as not relevant to Plaintiff]

Anchorage Serial No.	Name and Address	Date Offer Filed	Date of Manager's Decision
030209	George N. Keyston, Jr. (address above)	May 16, 1955	Aug. 15, 1958
030210	George N. Keyston, Jr. (address above)	"	"
030211	George N. Keyston, Jr. (address above)	"	"
030212	George N. Keyston, Jr. (address above)	"	"
030213	George N. Keyston, Jr. (address above)	"	"
030214	George N. Keyston, Jr. (address above)	"	"
030215	George N. Keyston, Jr. (address above)	"	"

[Appendix Cont'd]

Anchorage Serial No.	Name and Address	Date Offer Filed	Date of Manager's Decision
030422	J. E. Dawson, Jr. 750 Mountain Blvd. Oakland 11, California	June 8, 1955	Aug. 20, 1958
030427	J. E. Dawson, Jr. (address above)	"	"
030428	J. E. Dawson, Jr. (address above)	"	"
030429	J. E. Dawson, Jr. (address above)	"	Aug. 26, 1958
034586	Thorwald & Marie T. Osbo P.. O. Box 496 Seward, Alaska	June 11, 1957	Aug. 13, 1958
036561	Bert F. Duesing P. O. Box 244 Big Lake, Texas	Aug. 9, 1957	"
036562	Bert F. Duesing (address above)	"	"
036563	Bert F. Duesing (address above)	"	"
029800	Mrs. Eleanor E. Lane 218 East Fourth Avenue Anchorage, Alaska	April 18, 1955	Aug. 22, 1958
029801	Kenneth M. Johnston Box 1064 Anchorage, Alaska	April 19, 1955	Aug. 13, 1958
029802	Estate of Ralph T. Sweet Mrs Fay L. Sweet 717 M Street Anchorage, Alaska	April 18, 1955	"
029858	N. Fred Nelson Box 1265 Anchorage, Alaska	April 21, 1955	"
029961	Jack V. Walker (address above)	April 27, 1955	Sept. 16, 1958
030008	A. B. Hayes 525 - 3rd Avenue Anchorage, Alaska	May 2, 1955	Aug. 22, 1958
030126	Stanley E. Symons (address above)	May 5, 1955	Sept. 15, 1958

[Appendix Cont'd]

Anchorage Serial No.	Name and Address	Date Offer Filed	Date of Manager's Decision
030127	Newton H. Neustadter, Jr. 60 Sea Cliff Avenue San Francisco, California	"	Aug. 22, 1958
030132	Stanley E. Symons (address above)	"	"
030205	George N. Keyston, Jr. 1299 Bayshore Highway Burlingame, California	May 16, 1955	Aug. 15, 1958
030206	George N. Keyston, Jr. (address above)	"	"
030207	George N. Keyston, Jr. (address above)	"	"
030208	George N. Keyston, Jr. (address above)	"	"
036564	Bert F. Duesing (address above)	Aug. 9, 1957	Aug. 13, 1958
036565	Bert F. Duesing (address above)	"	"
036566	Bert F. Duesing (address above)	"	Aug. 20, 1958
036567	Bert F. Duesing (address above)	"	"
036568	Bert F. Duesing (address above)	"	"
036569	Bert F. Duesing (address above)	"	"
038084	Jack V. Walker (address above)	Sept. 12, 1957	Aug. 25, 1958
038376	Edward R. Coney 2878 Vallejo Street San Francisco 23, California	Sept. 23, 1957	"
038936	Mrs Edna Mae Walker P. O. Box 2256 Anchorage, Alaska	Oct. 4, 1957	Aug. 20, 1958
038937	Mrs. Edna Mae Walker (address above)	"	"

[Appendix Cont'd]

Anchorage Serial No.	Name and Address	Date Offer Filed	Date of Manager's Decision
038952	Newton H. Neustadter, Jr. (address above)	Oct. 7, 1957	Aug. 25, 1958
039138	Mrs Edna Mae Walker (address above)	Oct. 25, 1957	"
039739	Mrs. June M. Hines 3633 Scott Street San Francisco 23, California	Oct. 30, 1957	Aug. 20, 1958
039740	Mrs. June M. Hines (address above)	"	"
039741	Mrs. June M. Hines (address above)	Oct. 30, 1957	Aug. 20, 1958
039742	Mrs. June M. Hines (address above)	"	"
039743	Edward R. Coney (address above)	"	"
039744	Edward R. Coney (address above)	"	"
039745	Edward R. Coney (address above)	"	"
039746	Edward R. Coney (address above)	"	Dec. 31, 1958
039747	Edward R. Coney (address above)	"	Aug. 20, 1958
039748	Edward R. Coney (address above)	"	"
039811	Mrs. Elizabeth W. Coney (address above)	Nov. 5, 1957	"
039812	Mrs. Elizabeth W. Coney (address above)	"	"
039890	Mrs. Elizabeth W. Coney (address above)	Nov. 14, 1957	"
039891	George N. Keyston, Jr. (address above)	"	Aug. 22, 1958
039892	George N. Keyston, Jr. (address above)	"	"

[Appendix Cont'd]

Anchorage Serial No.	Name and Address	Date Offer Filed	Date of Manager's Decision
039893	George N. Keyston, Jr. (address above)	Nov. 14, 1957	Aug. 22, 1958
039924	George N. Keyston, Jr. (address above)	Nov. 15, 1957	"
039925	George N. Keyston, Jr. (address above)	"	"

EXHIBIT K

RICHARD K. TODD ET AL. 101263-61

A-28090
A-28311
A-28374

Decided October 30, 1961

Oil and Gas Leases: Discretion to Lease

The 1946 amendment to section 17 of the Mineral Leasing Act did not deprive the Secretary of the Interior of his authority to decide in his discretion whether it is in the public interest to issue oil and gas leases for certain areas of the public lands.

Oil and Gas Leases: Applications -- Oil and Gas Leases: Discretion to Lease

The Secretary of the Interior can reject an offer to lease for oil and gas when he determines that such action is in the public interest even though the land applied for may have been open to oil and gas leasing when the offer was filed.

Oil and Gas Leases: Discretion to Lease -- Withdrawals and Reservations: Generally -- Alaska: Oil and Gas Leases

The agreement signed by the Secretary on July 24, 1958, closing

part of the Kenai National Moose Range to oil and gas leasing was not issued pursuant to the Secretary's authority to withdraw public lands but in the exercise of his discretionary authority to issue oil and gas leases.

Administrative Procedure Act: Rule Making

The provisions of section 4 of the Administrative Procedure Act relating to rule making do not apply to regulations issued by the Secretary governing the issuance of oil and gas leases on the Kenai National Moose Range, because the regulation involves the use of public property and matters affecting public property are expressly excepted from the provisions governing rule making in section 4 of the Administrative Procedure Act.

Administrative Procedure Act: Hearings

The provisions of section 5 of the Administrative Procedure Act relating to hearings do not apply to offers to lease public land for oil and gas because a hearing is not required by the pertinent statute, the Mineral Leasing Act, nor by the due process provision of the Constitution.

Exhibit K - p. 45

UNITED STATES
DEPARTMENT OF THE INTERIOR

Office of the Secretary
Washington 25, D.C.

A-28090 Richard K. Todd et al.	)	Anchorage 026746, etc. Anchorage 040636 Anchorage 028099
A-28311 Ester R. Brautigam	)	Noncompetitive offers to lease for oil and gas rejected.
A-28374 M. B. Kirkpatrick	)	Affirmed.

46 APPEALS FROM THE BUREAU OF LAND MANAGEMENT

Richard K. Todd and others[1/] have appealed to the Secretary of the Interior from several decisions dated March 25, 1959, October 22,

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1/ See Appendix for the names of the appellants and the serial numbers of their offers.

1959, or December 29, 1959, respectively, of the Director or the Acting Director of the Bureau of Land Management which affirmed the rejection by the manager of the Anchorage land office of their respective non-competitive offers to lease for oil and gas certain lands within the boundaries of the Kenai National Moose Range on the Kenai Peninsula in Alaska because the lands applied for are within the portion of the moose range which the Secretary has decided to close to oil and gas leasing. The offers were filed pursuant to section 17 of the Mineral Leasing Act, as amended (30 U.S.C., 1958 ed., sec. 226). The Acting Director held that the determination of whether to issue a lease for oil and gas lies within the discretion of the Secretary and that, if the Secretary determines in his discretion not to lease certain land, offers to lease such land must be rejected.

The Kenai National Moose Range was established by Executive Order 8979, dated December 16, 1941 (6 F. R. 6471), which provided in pertinent part:

> "By virtue of the authority vested in me as President of the United States, it is ordered that, for the purpose of protecting the natural breeding and feeding range of the giant kenai moose on the Kenai Peninsula, Alaska, which in this area presents a unique wildlife feature and an unusual opportunity for the study in its natural environment of the practical management of a big game species that has considerable local economic value, all of the hereinafter - described areas of land and water of the United States lying on the northwest portion of the said Kenai Peninsula, be, and they are hereby, subject to valid existing rights, withdrawn and reserved for the use of the Department of the Interior and the Alaska Game Commission as a refuge and breeding ground for moose for carrying out the purposes of the Alaska Game Law of January 13, 1925, 43 Stat. 739, U.S.C., title 48, secs. 192-211, as amended:
>
> * * * * *

The order went on to state that except for a small strip of land not material here none of the land described "shall be subject to settlement, location, sale or entry, or other disposition," that the General Land Office (now Bureau of Land Management) retained primary jurisdiction over the lands, and that the order did not "prohibit the hunting or taking of moose and other game animals and game birds * * * ."

The moose range lies south of Anchorage and encompasses an area of approximately 2,000,000 acres in a roughly rectangular shape extending up to 125 miles from north to south and up to 70 miles from east to west.

In the most recent revision of the departmental regulation relating to oil and gas leasing of wildlife refuge and game range lands (43 CFR, 1959 Supp., 192.9), the Department, for purpose of controlling the issuance of oil and gas leases, divided the public lands withdrawn for wildlife purposes into four classes. One of these is "Alaska wildlife areas", which are defined as "areas in Alaska created by a withdrawal of public lands for the management of natural wildlife resources and administered by the United States Fish and Wildlife Service" (id., 192.9 (a)(4)). The moose range falls into this class. The regulation further provides that

> "As to game range lands and Alaska wildlife areas, representatives of the appropriate office of the Bureau of Land Management and the United States Fish and Wildlife Service will confer for the purpose of entering into an agreement specifying those lands which shall not be subject to oil and gas leasing. * * *" Id., 192.9(b)(3).

On July 24, 1958, the Secretary signed an agreement [2/] reached by these agencies which, roughly, opened the northern half of the range and closed the southern half to oil and gas leasing "because such activities would be incompatible with management thereof for wildlife purposes."

2/ Published in the Federal Register on August 2, 1958 (23 F.R. 5883).

The manager and Acting Director based their decisions upon this directive and indeed, if it is valid, the offers must be rejected. In their appeals the several appellants attack it on a variety of grounds.

48 On ground common to almost all the appeals is the contention that the Secretary has no discretion in determining whether to lease public lands not withdrawn from leasing by the Mineral Leasing Act, as amended, but that he is under a mandatory duty to issue a lease to the first person filing a proper application who is qualified to hold a lease under the act. Stated conversely, the contention is that upon the filing of their offers the appellants acquired a vested right to have leases issued to them, since the lands applied for were then open to leasing, and they could not be deprived of this right by any subsequent action of the Secretary, to wit, the adoption of the July 24, 1958, agreement. (The appellants' offers were all filed prior to that date.)

In the recent case of Haley v. Seaton, 281 F. 2d 620 (D.C. Cir. 1960), in which the identical argument was raised, the court rejected it, holding:

> "We are of the opinion, for reasons that we shall presently undertake to state, that the Secretary of the Interior had discretion to accept or reject Haley's applications for leases. If that conclusion is sound, then it must necessarily follow that the mere applications for leases created no vested rights in Haley.
>
> "As originally enacted, the Mineral Leasing Act of 1920 (§ 17) provided for leases only on 'deposits of oil or gas situated within the known geologic structure of a producing oil or gas field * * *.' However, § 13 of that Act authorized the Secretary of the Interior to issue an exclusive prospecting permit on land not within any known geological structure.
>
> "Section 13 of the Mineral Leasing Act was amended by the Act of August 21, 1935, 49 Stat. 674, to provide:

" ' That the Secretary of the Interior is hereby authorized, and directed, under such necessary and proper rules and regulations as he may prescribe, to grant to any applicant qualified under this Act a prospecting permit, * * * Provided, That said application was filed ninety days prior to the effective date of this amendatory Act. * * * Provided further, That any application for any prospecting permit filed after ninety days prior to the effective date of this amendatory Act shall be considered as an application for lease under section 17 thereof: * * * .'

"Section 17 of the Mineral Leasing Act provided 'that all unappropriated deposits of oil or gas situated within the known geologic
49 structure of a producing oil or gas field and the unentered lands containing the same * * * may be leased by the Secretary of the Interior * * *.' (Emphasis ours.)

"The Act of August 21, 1935, also amended § 17 of the Mineral Leasing Act to read, so far as here pertinent, as follows:

" 'Sec. 17. All lands subject to disposition under this Act which are known or believed to contain oil or gas deposits, except as herein otherwise provided, may be leased by the Secretary of the Interior after the effective date of this amendatory Act, to highest responsible qualified bidder by competitive bidding under general regulations. * * * Provided further, That the person first making application for the lease of any lands not within any known geologic structure of a producing oil or gas field who is qualified to hold a lease under this Act, including applicants for permits whose applications were filed ninety days prior to the effective date of this amendatory Act shall be entitled to a preference right over others to a lease of such lands without competitive bidding * * * .' (Emphasis ours.)

"Section 17 of the Mineral Leasing Act was again amended by the Act of August 8, 1946, 60 Stat. 950, to read, so far as here pertinent, as follows:

" 'Sec. 17. All lands subject to disposition under this Act which are known or believed to contain oil or gas deposits may be leased by the Secretary of the Interior. When the lands to be leased are within any known geological structure of a producing oil or gas field, they shall be leased to the highest responsible qualified bidder by competitive bidding under general regulations, * * *. When the lands to be leased are not within any known geological structure of a producing oil or gas field, the person first making application for the lease who is qualified to hold a lease under this Act shall be entitled to a lease of such lands without competitive bidding. * * * ' (Emphasis ours.)

"It is significant that the phrase 'may be leased by the Secretary of the Interior' in § 17 of the original Mineral Leasing Act was
50 carried forward without change in the Admendment of 1935 and the Amendment of 1946, indicating an intent to continue to give the Secretary of the Interior discretionary power, rather than a positive mandate to lease.

"It was authoritatively settled that an application for a prospecting permit under § 13, supra, as originally enacted, created no vested right in the applicant.[10/]

[10/] Wilbur v. United States, 60 App. D.C. 11, 46 F. 2d 217, affirmed United States, ex rel. McLennan v. Wilbur, 283 U.S. 414, 415, 51 S. Ct. 502, 75 L. Ed. 1148.

"The court, in United States ex rel. McLennan v. Wilbur, 283 U. S. 414, 418, 419, 51 S. Ct. 502, 504, 75 L. Ed. 1148, held

that the provisions of the Mineral Leasing Act plainly indicated 'that Congress held in mind the distinction between a positive mandate to the Secretary and permission to take certain action in his discretion. Also, the difference between applicants for mere privileges and those persons who, because of expenditures, or otherwise, deserved special consideration' and ' "that under that Act. [1920] the granting of a prospecting permit for oil and gas is discretionary with the Secretary of the Interior and any application may be granted or denied, * * *." '

"Prior to the amendment of § 17 by the Act of August 8, 1946, this court had held that the Secretary of the Interior had discretionary power to accept or reject an application for a noncompetitive oil and gas lease under § 17.[11/]

"11/ Wann v. Ickes, 67 App. D. C. 291, 92 F. 2d 215, 217; United States ex rel. Roughton v. Ickes, 69 App. D.C. 324, 101 F. 2d 248, 251; Dunn v. Ickes, 72 App. D.C. 325, 115 F. 2d 36, 37, certiorari denied 311 U.S. 698, 61 S. Ct. 137, 85 L. Ed. 452.

"This court, in United States ex. rel. Jordan v. Ickes, 79 App. D.C. 114, 143 F. 2d 152, certiorari denied 320 U.S. 801, 64 S. Ct. 432, 88 L. Ed. 484; 323 U.S. 759, 65 S. Ct. 93, 89 L. Ed. 608, held that it was not the intent of Congress by the amendatory Act of August 21, 1935, to deprive the Secretary of the Interior of such discretion accorded him under the original Act, except as to a very limited group of applications filed 90 days prior to the effective date of the amendment.

51 "We are of the opinion that the 1946 amendment in nowise limited such power in the Secretary of the Interior and continued his discretionary power either to grant or reject applications for leases. As observed above, the phrase in § 17 of the Mineral Leasing Act of 1920, as originally enacted, reading 'may be leased by the

> Secretary of the Interior' was not changed by the Amendment of August 8, 1946. It was carried into the amendatory Act. The provision for the leasing of lands within a known geological structure and lands not within any known geological structure applies only to lands 'to be leased,' plainly implying that the Secretary of the Interior was to determine what lands were to be leased. Accordingly, we conclude that the acceptance or rejection of the applications to lease here involved was a matter resting within the discretion of the Secretary of the Interior." (Pp. 624-25.)

Therefore, I conclude that the 1946 amendment to section 17 of the Mineral Leasing Act did not deprive the Secretary of his discretionary authority over the issuance of oil and gas leases under the Mineral Leasing Act, as amended.

In one form or another, most of the appellants contend that the Secretary lacks authority to withdraw from mineral leasing large areas of public lands. They assert, as a subsidiary to this argument, that in withdrawing part of the moose range from leasing the Secretary did not follow the procedure prescribed in his regulations for making withdrawals.

The short answer to these assertions is that neither in the agreement of July 24, 1958, supra, nor in the regulation pursuant to which the agreement was adopted did the Secretary purport to exercise his authority to withdraw land. Although the Secretary possesses and has long exercised broad authoity to withdraw public lands, he felt it desirable a number of years ago to formalize his authority by an express delegation from the President. Solicitor's opinion, 57 I. D. 331 (1941). Executive orders of delegation were issued, the latest being Executive Order No. 10355 of May 26, 1952 (17 F. R. 4831). Section 1 of this order specifies that all orders issued by the Secretary under authority of the order "shall be designated as public land orders." In accordance with this requirement orders of withdrawal issued by the Secretary have been designated and numbered as public land orders. See Appendix B to Chapter 1 of 43 CFR, 1954 ed., and 43 CFR, 1959 Supp. Neither the agreement of July 24,

1958, nor 43 CFR, 1959 Supp., 192.9 is designated as a public land order or recites as authority Executive Order No. 10355. Consequently it is plain that the Secretary did not purport to withdraw land under the authority of that order.

Aside from Executive Order No. 10355 the Secretary has only limited statutory authority to withdraw public lands, e. g., 43 U.S.C., 1958
52 ed., sec. 300(stock-driveway withdrawals), and 43 U.S.C., 1958 ed., sec. 416(reclamation withdrawals). To my knowledge he has never asserted that he had authority under the Mineral Leasing Act to withdraw land from leasing.

Finally, neither the agreement of July 24, 1958, nor the regulation is couched in the familiar language of withdrawal, language that is used again and again in public land orders and other statutory withdrawals. Certainly the Secretary would not have eschewed the use of such familiar language had he intended to make a withdrawal.

In adopting the agreement of July 24, 1958, the Secretary was simply exercising in a formal manner his discretionary authority over issuing noncompetitive leases under section 17 of the Mineral Leasing Act. Because the effect upon oil and gas applicants of the exercise of this authority is the same as a withdrawal of land, the appellants have confused the two authorities together. But the source of authority does not change because of its effect. Stripped of all authority to withdraw lands, the Secretary would still have his discretionary authority to refuse to issue leases where he thinks issuance would not be in the public interest.

The formal exercise by the Secretary of his discretionary authority is nothing new in the administration of the Mineral Leasing Act. Thus, on February 6, 1939, the Acting Secretary, for the purpose of protecting and conserving potash deposits, ordered that "until further notice, no lease under the oil and gas provisions of * * * [the Mineral Leasing Act] will be issued for the following-described lands [in New Mexico], and no application for oil and gas lease will be accepted, nor will any rights be acquired by the filing of an application therefor * * *"

(4 F. R. 1012). Again, in a memorandum dated April 18, 1942, to the Commissioner of the General Land Office, the Department adopted the policy of not issuing oil and gas leases in the Ivanpah Valley, California. See Marie E. Tuttle et al., A-27481 (January 28, 1958). And, on January 27, 1953, the Department issued Order No. 2714 (18 F. R. 700) declaring that "until further notice, no oil and gas lease under the Mineral Leasing Act * * *, shall be issued" for described wild areas in the Los Padres National Forest, California, and the Santa Fe National Forest, New Mexico. The area comprised wilderness areas. See Cecil H. Phillips et al., fn. 3, supra. These formal actions did not purport to be and did not constitute withdrawals of land. They were merely formalized exercises of discretion, just as the agreement of July 24, 1958 is.

Another argument offered by appellants is that the Secretary must issue them leases because at the date their offers were filed the lands applied for were open to oil and gas leasing under the pertinent statute and regulation. The facts are undisputed. The Mineral Leasing Act does not prohibit leasing within a moose range. The pertinent regulation, until its amendment in January 1958, permitted oil and gas leasing of
53 lands in wildlife refuges under certain conditions (43 CFR, 1954 ed., sec. 192.9) and would not necessarily have prevented the issuance of leases to appellants.

This is merely another facet of the contention that an applicant for an oil and gas lease acquires some right to a lease merely by filing his application. The contention has already been answered, but it may be observed here that the effect of the contention would be that once an application has been filed for land open to leasing the Secretary loses his discretion to determine whether a lease should be issued. He could only exercise his discretion prior to the filing of an application. With the thousands of acres of public land open to leasing, the appellants are asking the Secretary to do the impossible, i. e., make a determination in advance whether any land should not be leased. Not only would this cast an enormous initial burden upon the Secretary but it would freeze a determination by him once an application is filed, preventing him from

changing a determination on the basis of changing circumstances occurring after the filing of an application. Indeed, even if circumstances had changed prior to the filing of the application but a final determination of policy or the formalizing of a final determination had not been made prior to the filing, the hands of the Secretary would be tied. Such a conclusion has no support in law or in reason. 3/

Some of the appellants raise the claim of equities, that it is unfair to reject applications on the basis of a determination made 4 years after the applications were filed. In Dunn v. Ickes, supra, the plaintiff asked the court to order the Secretary to act on his application. Refusing to do so, the court said: "It cannot be doubted that under many circumstances withholding action on such applications for a rather extended period would be eminently proper, if not essential to wise administration." 115 F. 2d, at p. 37.

At all times material here, except for one brief period, the processing of oil and gas offers for lands in the Kenai moose range was suspended, pending revision of the regulations. The first of the offers under consideration was filed on May 21, 1954. Almost 9 months before, the Bureau of Land Management, by a memorandum dated August 31, 1953, ordered the suspension of action on all oil and gas offers within a fish and wildlife refuge until further notice pending a study of the policy and regulations relating to the issuance of leases in wildlife refuges.

On December 6, 1955, the Department amended the oil and gas regulation, 43 CFR 192.9 (20 F. R. 9009; Circular 1945), to close certain
54 areas to leasing, make some available for leasing under restrictions, and open others to unrestricted leasing. It appears that the Bureau considered that the approval and publication of the amended regulations automatically vacated the suspension order of August 31, 1953, and issued some oil and gas leases.

3/ In Order No. 2714, supra, the Department specifically directed that "All pending applications for such leases * * * shall be rejected." This is the same type of action that is being complained of here.

On December 20, 1955, the Director of the Fish and Wildlife Service asked the Director of the Bureau of Land Management to withhold action on all oil and gas lease offers for lands opened to unrestricted leasing because of certain inaccuracies in classification. By a letter dated February 6, 1956, the Chairman of the Committee on Merchant Marine and Fisheries of the House of Representatives notified the Secretary of the Interior that his committee was considering legislation to vest authority to dispose of wildlife refuges solely in Congress. He requested that the Department suspend its activities looking toward alienation of any interest in lands under the jurisdiction of the Fish and Wildlife Service until his committee had concluded its investigation. Thereupon, on February 6, 1956, the Bureau of Land Management directed its field officers to suspend action on all offers for oil and gas leases in fish and wildlife areas until March 1, 1956. This suspension was extended several times and on March 30, 1956, was made indefinite.

On October 11, 1957, notice was published in the Federal Register of a proposed revision of 43 CFR 192.9 (22 F. R. 8088). Paragraph (d) of the proposed regulation clearly stated that part or all of the Alaska wildlife areas might be closed to mineral leasing. Thereafter, a 2-day hearing was held on December 9 and 10, 1957, at which many proponents and opponents of the proposed regulation appeared, testified, and offered exhibits. A substantial portion of the testimony, both pro and con, was directed to the Kenai National Moose Range. The proposed regulation was modified as to form and adoped on January 8, 1958 (23 F. R. 227; Circular 1990). It was followed on July 24, 1958, by the agreement dividing the moose range into leasable and nonleasable areas.

The amended regulation provides that "All pending offers or applications heretofore filed for oil and gas leases covering game ranges, coordination lands, and Alaska Wildlife areas, will continue to be suspended until the agreements referred to in paragraph (b)(3) of this section shall have been completed." 43 CFR, 1958 Supp., 192.9(d).

Upon the approval of the agreement of July 24, 1958, all the offers pending for lands in the part closed to leasing were rejected.

In summary, the only period from August 31, 1953, to January 8, 1958, when the processing of oil and gas lease offers for lands in the Kenai moose range was not suspended was from December 6, 1955, to
55 February 6, 1956, a period of two months. None of the offers on appeal was filed in that period. In other words, the appellants filed their offers at times [4/] when it was well known that the Department was deeply involved in attempts to work out a solution to the problem of the conflicting demands for the utilization of the moose range and when it was perfectly apparent that one course of action the Department might adopt would be to close all or part of the moose range to leasing. In the circumstances, the appellants cannot properly allege that the fact that they filed offers raises any equitable considerations in their behalf. At best, they gambled that the lands they applied for would be opened to leasing. Having lost, they have little ground for complaint.

In any event, the determination of whether or not to lease tracts of public land under the Mineral Leasing Act is based upon the public interest, not upon whether one applicant managed to file an offer, or a series of offers, before the Secretary made his finding.

The offerors also assert that even if the Secretary has authority to determine in his discretion whether oil and gas leases should be issued for all or part of the moose range, it was unnecessary to prohibit oil and gas leasing on all or part of it in order to attain the purposes for which it was withdrawn. In support of these contentions they have submitted arguments and exhibits purporting to demonstrate that "oil is compatible with moose" or that the division made is illogical.

However, the proposed revision of 43 CFR 192.9 was published in the Federal Register and a hearing was held. The proposed regulation clearly provided that all or part of the range might be closed to oil and gas leasing. Many of the appellants or their representatives appeared

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4/ The offers were filed at various times from May 21, 1954, to January 8, 1958.

at the hearing and made substantially the same arguments. In addition, other persons testified in support of their position. There was also, of course, a great deal of testimony in opposition.

The agreement reached between the Bureau of Land Management and the Fish and Wildlife Service and signed by the Secretary was arrived at in full awareness of all the factors involved and represents the considered judgment of the Bureaus and the Secretary that the division of the moose range is the proper method of balancing the several components of the public interest in this area.

Another contention is that the Secretary has failed to comply with the requirements of the Administrative Procedure Act, 5 U.S.C., 1958 ed., sec. 1001 et seq. One argument is that the agreement of July 24,
56 1958, is rule making and that section 4 of the Administrative Procedure Act (5 U.S.C., 1958 ed., sec. 1003) requires notice and hearing of proposed rule making. First, as has been pointed out, notice was given and a hearing held on the proposed revision of 43 CFR 192.9. The agreement relating to the moose range was contemplated in the proposed regulation and all interested parties had ample opportunity to present their views. More important, the regulation involves the use of public property and "matters relating to public property are expressly excepted from the requirements of section 4 by the introductory paragraph of the section." Wade McNeil et al., 64 I. D. 423, 429-430 (1957). 5/

5/ The McNeil decision was attacked in court, Wade McNeil v. Fred A. Seaton, Civil No. 648-58, United States District Court for District of Columbia. On June 4, 1959, the court held for the defendant. In sustaining the validity of the special rule for grazing on public lands, which was attached in the departmental proceedings, the court said, in answer to the contention that the proposed rule-making provisions of the Administrative Procedure Act had not been observed in the adoption of the special rule:

> "The government relies on the exception involved in the phrase 'public property'. There is no doubt that public lands are public property. The rule here in question involved a matter relating to public lands and, therefore, public property.

[See next page]

In the alternative, it is contended that the agreement is an adjudication which, under section 5 of the Administrative Procedure Act (5 U.S.C., 1958 ed., sec. 1004) requires that the notice and hearing procedure of that section be followed. However, the provisions of the Administrative Procedure Act do not apply to determinations relating to
57 the issuance of an oil and gas lease because no hearing is required by the Mineral Leasing Act, Northern Pacific Railway Company et at., 62 I. D. 401, 410 (1955), nor have the offerors any rights which require a hearing to satisfy the due process requirements of the Constitution. See United States v. Keith V. O'Leary et al., 63 I. D. 341 (1956).

In addition to the offerors, the Standard Oil Company, which entered into an oil and gas development contract with the United States of America on July 14, 1954, for an area which includes a portion of the area in the moose range closed to leasing has filed a motion to intervene and presented arguments in favor of the offerors from whom it has acquired options. The motion to intervene is allowed. In addition to the arguments made by one or more of the appellants, Standard contends that the rejection of the lease offers violates its rights under the contract. However, I can find nothing in the contract which obligated the United

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5/ [Cont'd] It follows, therefore, that the requirements of Section 1003 of Title 5, United States Code, do not apply to the adoption of the rule here in question."

Upon appeal, the decision of the District Court was reversed on the merits, but on this point the court said:

> "[Appellant] asks us to strike down the Special Rule on the ground, among others, that the rule was issued without notice and hearing. We do not agree with appellant on that proposition. * * * Again, the notice requirements of section 4 of the Administrative Procedure Act * * * contain an express exception when there is involved rule making relating 'to public property, loans, grants, benefits, or contracts'. That we are here dealing with matter relating to public property is obvious * * *." McNeil v. Seaton, 281 F. 2d 931, 936 (D. C. Cir. 1960).

States in any way to issue leases within the moose range, or, indeed, anything which assures Standard that any leases within the moose range will be optioned to it.

Standard submitted the development contract for approval by a letter dated May 14, 1954. The letter recited that various individuals "are holders of or have filed" offers for lands in the southerly portion of the Kenai Peninsula; that Standard has been offered operating agreements "covering leases heretofore issued and which shall hereafter be issued pursuant to lease offers filed by individuals as aforementioned"; and that Standard is willing to acquire such operating agreements provided the development contract is approved. It is interesting then to note that the only offers listed in Standard's motion to intervene were filed on May 21, 1954, seven days after Standard submitted the development contract for approval, and that Standard did not acquire options on the offers until June 15, 1954.

Moreover, Standard's letter of May 14, 1954, stated:

> "The proposed contract places no restriction whatsoever on the leasing by the United States under the General Leasing Act or otherwise, of any Public Domain or Territorial School lands located within the area defined in the contract."

Furthermore, section 17 of the contract provides that " *** no operations shall be conducted pursuant to this agreement upon any lands included in such range without prior approval of the appropriate controlling Federal agency." This provision makes it clear that Standard entered into the contract without any assurance that lands in the moose range would be made available to it.

58 Finally, there is still more acreage within the area covered by the development contract than Standard may hold under it.

I find Standard's contentions, therefore, to be without merit.

Therefore, the decisions of the Director and Acting Director of the Bureau of Land Management are affirmed.

/s/ John A. Carver, Jr.
Asst. Secretary of the Interior

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APPENDIX

A-28090 Richard K. Todd	Anchorage	026746
Richard K. Todd	"	026749
Mrs. Mary P. Boyd	"	026752
R. R. Clements	"	026756
R. R. Clements	"	026757
R. R. Clements	"	026758
R. R. Clements	"	026759
R. R. Clements	"	026760
R. R. Clements	"	026761
Charles D. Ealand	"	026763
Tom H. Dowlen	"	026767
Tom H. Dowlen	"	026768
Tom H. Dowlen	"	026769
Tom H. Dowlen	"	026771
Tom H. Dowlen	"	026772
The Ohio Oil Company	"	028044
The Ohio Oil Company	"	028045
The Ohio Oil Company	"	028046
L. P. Foote	"	028090
A. F. Tokash	"	028095
M. B. Kirkpatrick	"	028098
Estate of E. Wells Ervin	"	028145
Estate of E. Wells Ervin	"	028147
Gene B. Graham	"	028594
Gene B. Graham	"	028597
Gene B. Graham	"	028598
Gene B. Graham	"	028599
George Hall Douglass	"	028606
George Hall Douglass	"	028610
E. J. Feisel, Jr.	"	028745
E. J. Feisel, Jr.	"	028746

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	H. W. Nagley, Jr.	Anchorage	029147
	E. E. Rasmuson	"	029180
	H. Willard Nagley, Jr.	"	029247
	H. Willard Nagley, Jr.	"	029248
	Milan Raykovich	"	029250
	Milan Raykovich	"	029251
	Milan Raykovich	"	029253
	Milan Raykovich	"	029254
	Milan Raykovich	"	029255
	Milan Raykovich	"	029256
	Milan Raykovich	"	029257
	Milan Raykovich	"	029258
60	Robert B. Atwood	"	029287
	Robert B. Atwood	"	029288
	Robert B. Atwood	"	029290
	Robert B. Atwood	"	029291
	Robert B. Atwood	"	029292
	Robert B. Atwood	"	029293
	Robert B. Atwood	"	029294
	Rodney L. Johnston	"	029295
	Rodney L. Johnston	"	029296
	Rodney L. Johnston	"	029297
	Rodney L. Johnston	"	029298
	Rodney L. Johnston	"	029299
	Rodney L. Johnston	"	029300
	L. E. Grammer	"	029314
	L. E. Grammer	"	029315
	L. E. Grammer	"	029434
	L. E. Grammer	"	029435
	Jack V. Walker	"	029577
	Jack V. Walker	"	029578

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	Stanley E. Symons	Anchorage	029584
	Sidney L. Schwartz	"	029586
	Walter A. Hamshaw	"	029588
	Sidney L. Schwartz	"	029590
	Sidney L. Schwartz	"	029592
	Stanley E. Symons	"	029596
	Stanley E. Symons	"	029597
	Dr. E. Earll Kinzer	"	029617
	Dr. E. Earll Kinzer	"	029618
	Dr. E. Earll Kinzer	"	029619
	Dr. E. Earll Kinzer	"	029620
	Dr. E. Earll Kinzer	"	029621
	Clay E. Selby	"	029628
	Clay E. Selby	"	029629
	Clay E. Selby	"	029631
	Clay E. Selby	"	029632
	Sydney D. Smith	"	029653
	L. E. Grammer	"	029735
	L. E. Grammer	"	029736
	E. J. Feisel, Jr.	"	029737
	Lloyd Kilkeary	"	029738
	Mrs. Elizabeth W. Coney	"	029739
	Sidney L. Schwartz	"	029741
	Martin J. Dinkelspiel	"	029742
	Marco F. Hellman	"	029743
61	Lloyd F. Smith	"	029765
	L. E. Grammer	"	029766
	Alexander S. Dunham	"	029767
	Mrs, Esther R. Brautigam	"	029778
	Jack V. Walker	"	029790
	John N. Ferguson	"	029794

APPENDIX

J. L. McCarrey, Jr. & Mrs. Cora B. McCarrey	Anchorage	029799
Mrs. Eleanor E. Lane	"	029800
Kenneth M. Johnston	"	029801
Estate of Ralph T. Sweet	"	029802
N. Fred Nelson	"	029858
Jack V. Walker	"	029961
A. B. Hayes	"	030008
Stanley E. Symons	"	030126
Newton H. Neustadter, Jr.	"	030127
Stanley E. Symons	"	030132
George N. Keyston, Jr.	"	030205
George N. Keyston, Jr.	"	030206
George N. Keyston, Jr.	"	030207
George N. Keyston, Jr.	"	030208
George N. Keyston, Jr.	"	030209
George N. Keyston, Jr.	"	030210
George N. Keyston, Jr.	"	030211
George N. Keyston, Jr.	"	030212
George N. Keyston, Jr.	"	030213
George N. Keyston, Jr.	"	030214
George N. Keyston, Jr.	"	030215
J. E. Dawson, Jr.	"	030422
J. E. Dawson, Jr.	"	030427
J. E. Dawson, Jr.	"	030428
J. E. Dawson, Jr.	"	030429
Thorwald & Marie T. Osbo	"	034586
Bert F. Duesing	"	036561
Bert F. Duesing	"	036562
Bert F. Duesing	"	036563
Bert F. Duesing	"	036564
Bert F. Duesing	"	036565
Bert F. Duesing	"	036566
Bert F. Duesing	"	036567

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	Bert F. Duesing	Anchorage	036568
	Bert F. Duesing	"	036569
	Jack V. Walker	"	038084
	Edward R. Coney	"	038376
	Mrs Edna Mae Walker	"	038936
	Mrs. Edna Mae Walker	"	038937
	Newton H. Neustradter, Jr.	"	038952
62	Mrs Edna Mae Walker	"	039138
	Mrs. June M. Hines	"	039739
	Mrs. June M. Hines	"	039740
	Mrs. June M. Hines	"	039741
	Mrs. June M. Hines	"	039742
	Edward R. Coney	"	039743
	Edward R. Coney	"	039744
	Edward R. Coney	"	039745
	Edward R. Coney	"	039746
	Edward R. Coney	"	039747
	Edward R. Coney	"	039748
	Mrs. Elizabeth W. Coney	"	039811
	Mrs. Elizabeth W. Coney	"	039812
	Mrs. Elizabeth W. Coney	"	039890
	George N. Keyston, Jr.	"	039891
	George N. Keyston, Jr.	"	039892
	George N. Keyston, Jr.	"	039893
	George N. Keyston, Jr.	"	039924
	George N. Keyston, Jr.	"	039925
	Dome Oil Exploration Company	"	040187
	Dome Oil Exploration Company	"	040188
	Dome Oil Exploration Company	"	040189
	Dome Oil Exploration Company	"	040190
	Dome Oil Exploration Company	"	040191
	Mrs. June M. Hines	"	040635

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L. E. Grammer	Anchorage	040681
Dome Oil Exploration Company	"	040682
Dome Oil Exploration Company	"	040683
Alvest, Inc.	"	040135
Alvest, Inc.	"	040136
Alvest, Inc.	"	040137
A-28311: Ester R. Brautigam	"	040636
A-28374: M. B. Kirkpatrick	"	028099

[Filed April 17, 1962]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BERT F. DUESING,
Plaintiff

v.

STEWART L. UDALL, Secretary of the Interior,
Defendant

Civil No. 290-62

DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

The Defendant moves the Court to dismiss this action because the complaint fails to state a claim against the defendant upon which relief can be granted.

The reason why the complaint fails to state a claim against the defendant upon which relief can be granted is set forth in detail in the memorandum of points and authorities filed in support of this motion.

/s/ Herbert Pittle
Attorney for Defendant

* * *

[Filed May 15, 1962]

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Plaintiff, by his attorney, moves the Court for summary judgment pursuant to Rule 56 F.R. Civ. P., in accordance with the relief sought in the complaint. This motion is based on the following grounds:

1. Defendant's motion to dismiss for failure to state a claim constitutes an admission of all the material facts recited in the complaint.

2. There is no genuine issue as to any material fact and plaintiff is entitled to judgment as a matter of law.

3. A statement of the material facts as to which there is no genuine issue is set forth in a Memorandum of Points and Authorities which is annexed hereto in support of this motion for summary judgment.

For his response to defendant's motion to dismiss for failure to state a claim the plaintiff adopts the Memorandum of Points and Authorities submitted herewith.

Respectfully submitted,

/s/ Max Barash

* * *

Attorney for Plaintiff

[Certificate of Service: Dated May 15, 1962]

[Filed May 15, 1962]

PLAINTIFF'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 9 of the Local Civil Rules of this Honorable Court, plaintiff submits in support of his motion for summary judgment this statement of material facts as to which there is no genuine issue, as follows:

1. On August 9, 1957, plaintiff filed in the Anchorage, Alaska, land office of the Bureau of Land Management nine noncompetitive oil and gas lease offers, identified by serial numbers Anchorage 036561 to 036569, inclusive, covering a total of 20,480 acres of public domain lands [the land in suit] in the Kenai Moose Range on the Kenai Peninsula, Alaska. See par. 8 of complaint.

2. The lease offers were submitted in proper form for lands not within a known geological structure of a producing oil or gas field and were accompanied by the proper filing fees and first year rentals, as required by the applicable statute and regulations, which filing fees and rentals were accepted by defendant. See par. 8 of complaint.

3. When the lease offers were filed on August 9, 1957, the controlling regulation then in force and effect was 43 CFR 192.9, approved December 6, 1955, Circular 1945. This regulation was promulgated by defendant pursuant to Section 32 of the Mineral Leasing Act of February 25, 1920, as amended (30 U.S.C. 189), and authorized the issuance of oil and gas leases covering the land in suit. See par. 7 of complaint.

4. Some five months later on January 8, 1958, defendant amended the then existing regulation 43 CFR 192.9 by promulgating a new regulation identified as Circular 1990. This regulation suspended action on all pending offers or applications theretofore filed, including plaintiff's, for oil and gas leases covering game ranges, coordination lands, and Alaska wildlife areas, and directed representatives of the Bureau of Land Management and the United States Fish and Wildlife Service to confer for the purpose of entering into an agreement specifying those lands which shall not be subject to oil and gas leasing. Such agreement was not to be effective until approved by defendant. See pars. 9 and 10 of complaint.

5. On July 24, 1958, defendant approved an agreement between the Bureau of Land Management and the Fish and Wildlife Service designating an area of about 1,689 square miles in the Southern half of the Kenai National Moose Range as closed to oil and gas leasing. The land in suit is part of this area closed to leasing. The Northern half of the

moose range comprising an area of about 1,525 square miles was declared open to oil and gas leasing. Notice of this agreement was published in the Federal Register of August 2, 1958 (23 F.R. 5883). See par. 10 of complaint.

6. On the basis of the agreement between the Bureau of Land Management and Fish and Wildlife Service approved by defendant on July 24, 1958, closing to oil and gas leasing the Southern half of the Kenai National Moose Range, including the land in suit, plaintiff's lease offers were rejected by two decisions of the Anchorage land office dated August 13, 1958, and August 20, 1958. These decisions applied retroactively to plaintiff's lease offers the new regulation Circular 1990 and the agreement of July 24, 1958. See par 11 of complaint.

7. On appeal to the Secretary from the decision of the Bureau of Land Management affirming the action of the local land office defendant held that the agreement closing part of the Kenai National Moose Range to oil and gas leasing did not constitute a withdrawal of public lands but merely the exercise of his discretionary authority over issuing noncompetitive leases under Section 17 of the Mineral Leasing Act. See par. 13 of complaint.

Respectfully submitted,

/s/ MAX BARASH

* * *

Attorney for Plaintiff

[Certificate of Service:]

[Filed May 25, 1962]

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The defendant moves the Court for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and Rule 9 of the Rules of this Court on the grounds that there is no genuine issue as to any

material fact and the defendant is entitled to judgment as a matter of law.

This motion is based upon the complaint and its attached exhibits and the defendant's statement and counterstatement under Rule 9H of material facts as to which there is no genuine issue.

Respectfully,

/s/ Herbert Pittle
Attorney for Defendant

[Filed May 25, 1962]

DEFENDANT'S STATEMENT AND COUNTERSTATEMENT UNDER RULE 9H OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE, IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

Pursuant to Rule 9H of the Rules of this Court, the defendant submits in support of his motion for summary judgment the following statement of material facts as to which there is no genuine issue.

The defendant adopts the statements in paragraphs 1, 2, 3, 4 and 5 of plaintiff's statement of material facts, and the defendant adopts the first sentence of paragraph 6 of plaintiff's statement of material facts.

In addition, the defendant submits the following facts as to which he contends there is no controversy:

1. Commencing August 31, 1953, the processing of oil and gas lease offers for lands in the Kenai Moose Range was suspended pending revision of the regulations by the Secretary of the Interior.

2. The suspension was ordered by a memorandum bearing that date, issued by the Bureau of Land Management, which directed suspension of action on all oil and gas offers within a fish and wildlife refuge until further notice pending a study of the policy and regulations relating to the issuance of leases in wildlife refuges.

3. The only period between August 31, 1953 to January 8, 1958, when the processing of oil and gas offers for lands in the Kenai Moose

Range was not suspended, was from December 6, 1955 to February 6, 1956, a period of only two months.

4. None of the plaintiff's offers was filed during the period December 6, 1955 to February 6, 1956.

Respectfully,

/s/ Herbert Pittle
Attorney for Defendant

TRANSCRIPT OF THE ORAL OPINION OF THE COURT

Washington, D. C.
July 17, 1962.

1 The above cause came on for hearing of motions before THE HONORABLE ALEXANDER HOLTZOFF, United States District Judge.

APPEARANCES:

On behalf of the Plaintiff:

MAX BARASH, ESQ.

On behalf of the Defendant:

HERBERT PITTLE, ESQ.
Attorney, Department of Justice.

2 OPINION OF THE COURT

THE COURT: This is an action against the Secretary of the Interior to require him to grant a lease to the plaintiff on certain public lands in Alaska under the Mineral Leasing Act, 30 United States Code 226.

The salient facts are few. The pertinent statute, Section 17 of the Mineral Leasing Act, as amended by the Act of August 8, 1946, 60 Stat. 950 -- and I might say I am using the text in the Statutes At Large rather than in the United States Code, Title 30, Section 226, because the text in the Code breaks up the text of the statutes into sub-divisions and thereby unintentionally creates an ambiguity in the meaning of the statute.

Section 17, to which I referred, provides that all lands subject to disposition under this Act, meaning the Mineral Leasing Act, which are known or believed to contain oil or gas deposits may be leased by the Secretary of the Interior. In other words, the Secretary of the Interior is vested with discretion to lease or not to lease such lands. Then follows a provision which is immaterial to this discussion. Following that is the following provision:

> "When the lands to be leased are not within any known geological structure of a producing oil and gas field, the person first making
3 application for the lease who is qualified to hold the lease under this Act shall be entitled to lease of such lands without competitive bidding."

In other words, the Secretary of the Interior has discretion to decide whether or not to lease any particular plot of land, but if he has made the decision to do so he may not make a choice among various applicants for a lease but he may grant a lease only to the person first making the application who is qualified to hold a lease.

In this case, the Secretary invited bids for leases on certain lands in Alaska. The plaintiff applied for such a lease and he was the first qualified applicant.

After the application for a lease was filed but prior to any action being taken on the application, the Secretary changed his decision and announced that he would not lease the property in question. His purpose in so doing is immaterial, although it may be said that it was decided by the Department of Interior, after a series of conferences and hearings, that the property should be withheld from leases in the interest of conservation of natural resources and for the purpose of maintaining it as a wildlife refuge.

The statute involved here was recently construed by the Court of Appeals for the District of Columbia in Haley v. Seaton, 108 App. D.C.
4 257 at 260 and 261. The Court held in that case that a person first making an application acquires a preference right as against third persons but no vested rights against the United States, and the Court

further states that in its opinion the Secretary of the Interior had discretion to accept or reject the applications for leases.

I might add that the one thing the Secretary did not have a right to do was to grant the lease to someone else, and this he did not do.

This construction of the statute was also recognized by the Court of Appeals in McKay v. Wahlenmaier, 96 App. D.C. 313 at 324 and 325. There Judge Miller, now Chief Judge of the Court of Appeals, stated that whether to offer land for lease was a discretionary matter with the Secretary, but having invited applications for a non-competitive lease, he had no discretion as to selecting the lessee because the statute awards the lease to the first qualified applicant.

The Secretary of the Interior, of course, as any other Government official, had a right to change his mind, unless, indeed, any vested rights had intervened. The fact is that no vested rights intervened here.

It is argued that it was unreasonable and arbitrary for the Secretary to change his mind and withhold the property from leasing. The Court is unable to discern anything of an arbitrary or unreasonable character in the action of the Secretary. He took the step involved here after investigations, hearings and conferences with various interested parties. Surely the Court may not substitute its discretion for that of the Secretary of the Interior.

The Court perceives no illegality in the action of the Secretary and is of the opinion that, as a matter of law, the plaintiff is not entitled to relief.

Accordingly, the defendant's motion for summary judgment is granted and the plaintiff's cross motion is denied.

CERTIFICATE OF REPORTER

* * * * *

In Witness Whereof, I have affixed my signature this 26th day of July, 1962.

/s/ Gerald Nevitt
Court Reporter

[Filed July 23, 1962,
As Modified July 25, 1962]

JUDGMENT

This case having come on for hearing on plaintiff's motion for summary judgment and defendant's cross-motion for summary judgment, and the Court having heard argument of counsel and considered the material in support of both motions, and it appearing that there is no genuine issue of fact and that defendant is entitled to judgment as a matter of law,

WHEREFORE, IT IS ORDERED as follows:

1. Defendant's cross-motion for summary judgment be granted.

2. Plaintiff's motion for summary judgment be denied.

3. Judgment is hereby entered against the plaintiff and in favor of the defendant and the complaint is dismissed.

Dated this 23rd day of July, 1962.

/s/ ALEXANDER HOLTZOFF
United States District Judge

[Filed September 18, 1962]

NOTICE OF APPEAL

Notice is hereby given this 18th day of September, 1962, that the plaintiff, Bert F. Duesing, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 23rd day of July, 1962, as amended the 25th day of July, 1962, in favor of the defendant.

/s/ Max Barash
711 - 14th Street, N.W.
Washington 5, D. C.

Attorney for Bert F. Duesing,
Plaintiff

[Certificate of Service: Dated September 18, 1962]
